CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, Notices, and Abstracts

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 34 **JULY 5, 2000** **NO. 27**

This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

The decisions, rulings, regulations, notices and abstracts which are published in the CUSTOMS BULLETIN are subject to correction for typographical or other printing errors. Users may notify the U.S. Customs Service, Office of Finance, Logistics Division, National Support Services Center, Washington, DC 20229, of any such errors in order that corrections may be made before the bound volumes are published.

Please visit the U.S. Customs Web at:
http://www.customs.gov

For sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402

U.S. Customs Service

Treasury Decisions

19 CFR Part 171

(T.D. 00–41)

RIN 1515–AC08

GUIDELINES FOR THE IMPOSITION AND MITIGATION OF PENALTIES FOR VIOLATIONS OF 19 U.S.C. 1592

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document revises Appendix B to Part 171 of the Customs Regulations, which sets forth the guidelines for remitting and mitigating penalties relating to violations of section 592 of the Tariff Act of 1930, as amended. A violation of section 592 involves the entry or introduction or attempted entry or introduction of merchandise into the commerce of the United States by fraud, gross negligence, or negligence. Many of the changes to Appendix B reflect the Customs Modernization Act and its themes of "informed compliance" and "shared responsibility."

EFFECTIVE DATE: July 24, 2000.

FOR FURTHER INFORMATION CONTACT: Charles D. Ressin, Penalties Branch (202) 927–2344.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, the President signed the North American Free Trade Agreement Implementation Act (Public Law 103–182). The Customs Modernization portion of this Act (Title VI), popularly known as the Customs Modernization Act or "the Mod Act", became effective when it was signed. The Mod Act emphasizes the themes of "shared responsibility" and "informed compliance" for Customs and the public.

Consistent with the Mod Act, Customs has initiated a thorough examination and review of its procedures and processes relating to importer compliance with Customs laws, regulations, and policies. In this

review, the agency has considered a number of innovative approaches to improving the service it provides the importing public as well as new approaches to encourage compliance and address incidents of non-compliance.

With regard to compliance, Customs is dedicated to educating its personnel to improve agency selection of appropriate remedies to address incidents of non-compliance. In keeping with the Mod Act theme of informed compliance, Customs is also attempting to educate the importing public about its requirements, particularly in areas involving complex import transactions. A more informed public promotes an overall greater level of compliance than the threat of an occasional and often ineffective penalty.

In Appendix B to Part 171 of the Customs Regulations (19 CFR Part 171) Customs has guidelines for remitting and mitigating penalties relating to violations of section 592 of the Tariff Act of 1930, as amended (19 U.S.C. 1592)(hereinafter referred to as section 592). A violation of section 592 involves the entry or introduction or attempted entry or introduction of merchandise into the United States by fraud, gross negligence or negligence. In accordance with the "shared responsibility" and "informed compliance" approach of the Mod Act, Customs proposed a revision of these guidelines in a notice of proposed rulemaking published in the Federal Register (63 FR 57628) on October 28, 1998. This proposed revision consisted of a reorganization of the content of the current guidelines into a new format intended to more clearly identify important provisions which are contained in the present text. Below is a summary of the proposed revised guidelines.

Summary of Proposed Revised Guidelines

After the introductory text, the proposed revised guidelines broke current section (A) into 2 paragraphs. Proposed section (A) discussed what constitutes section 592 violations and proposed section (B) discussed what is meant by materiality.

Proposed section (A) clarified that placing merchandise in-bond is considered entering or introducing merchandise into the United States for purposes of section 592. The paragraph also made it clear that if one unintentionally transmits a clerical error to Customs electronically, and that clerical error is transmitted repetitively by the electronic system, Customs will not consider repetitions of the non-intentional electronic transmission of the initial clerical error as constituting a pattern, unless Customs has drawn the error to the party's attention.

In proposed section (B), defining materiality under section 592, that definition was clarified by providing that a document, statement, act, or omission is material if it significantly impairs Customs ability to collect and report accurate trade statistics, deceives the public as to the source, origin or quality of the merchandise, or constitutes an unfair trade practice in violation of federal law.

Proposed section (C) discussed the degrees of culpability under section 592. The degrees of culpability are currently discussed in section (B).

A section (D) was proposed to be added to include terms used throughout the guidelines. Included in this section were discussions of the terms: duty loss violations; non-duty loss violations; actual loss of duty; potential loss of duty; reasonable care; clerical error; and mistake of fact.

A section (E) was proposed to be added which tracked the administrative penalty process in chronological order. Proposed section (E) was a revision of current section (C). It began with the case initiation and proceeded to describe the considerations pertinent to the decision to issue a pre-penalty notice and how the different types of violations can produce different proposed claim amounts depending upon the level of culpability and the presence of mitigating and/or aggravating factors. The proposed guidelines contained express guidance regarding statute of limitations considerations and Customs policy regarding waivers when the issuance of pre-penalty and penalty notices are involved.

Continuing in their chronological progression, the proposed guidelines next addressed steps to be taken when Customs decides whether to close a case or issue a penalty notice. Most of this material is contained in paragraph (C)(2) of the current guidelines. However, the proposed guidelines provided that penalty notices can indicate higher degrees of culpability and proposed penalty amounts than were contained in the original pre-penalty notice if less than 9 months remain before the expiration of the statute of limitations, and a waiver of the statute has not been received. The current guidelines provide that such increased penalty notices would only be issued if less than 3 months remained.

Section (F) of the proposed guidelines covered the procedures that are to be followed and elements that Customs will consider as part of the case record for any mitigating and/or aggravating factors. The current guidelines discuss mitigating factors in section (F) and aggravating factors in section (G). Proposed section (F) was arranged so the various types and degrees of violations are explained and respective mitigation considerations are explained. The section also informed the reader who within Customs has the authority to cancel or remit penalty claims.

Proposed paragraph (F)(2)(f) provided a discussion of prior disclosure and the reduced penalties based upon the different levels of culpability for a valid prior disclosure. Prior disclosure is discussed in section (E) of the current guidelines.

Proposed section (G) of the guidelines discussed the factors that are considered by Customs in proposing a penalty or mitigating an assessed penalty claim. Among these factors are: an error by Customs that contributed to the violation; the extent of cooperation by the violator with the investigation by Customs into the alleged violation; whether or not the violator takes immediate steps to remedy the situation that caused the violation; inexperience in importing; and the prior record of the vio-

lator in its dealings with Customs. This proposed section combined the factors located in sections (F) and (H) of the current guidelines. It was felt that a separate section was no longer necessary for "extraordinary" factors such as the ability of Customs to obtain personal jurisdiction over the violator, the violator's financial status, and whether Customs had actual knowledge of repeated violations but failed to inform the violator thus depriving him of the opportunity to take corrective action. All these factors were contained in the one section. The proposed section allowed that additional factors may be considered in appropriate circumstances.

Proposed section (H) contained the factors that Customs believes are to be treated as aggravating factors when considering mitigation of proposed or assessed penalties. Most of these factors are found in section (G) of the current guidelines. While the list of factors was not intended to be all-inclusive, two new factors were proposed to be added. They were: the discovery of evidence of a motive to evade a prohibition or restriction on the admissibility of merchandise, and failure to comply with a lawful demand for records or a Customs summons.

Section (I) of the proposed guidelines addressed offers in compromise (settlement offers). This was a new element not contained in the current guidelines. The proposed section instructed parties who wish to submit a civil offer in compromise pursuant to 19 U.S.C. 1617 to follow procedures outlined in § 161.5 of the Customs Regulations (19 CFR 161.5). The section summarized what steps will be taken by both parties once such an offer has been made.

Section (J) of the proposed guidelines contained instructions to be followed in instances where Customs makes a demand for payment of actual loss of duties pursuant to section 592(d). This is a subject not addressed in the current guidelines. The section provided that Customs will follow the procedures set forth in § 162.79b of the Customs Regulations (19 CFR 162.79b) and stated that no such demand will be issued unless the record establishes the presence of a violation of section 592(a). The section stated that, absent statute of limitations problems, Customs will endeavor to issue section 592(d) demands to concerned sureties and non-violator importers only after default by principals.

Section (K) of the proposed guidelines addressed violations of section 592 by brokers. The current guidelines discuss brokers in section (I). The section proposed to continue the present practice of applying the overall mitigation guidelines in instances of fraud or where the broker shares in the financial benefits of a violation. However, where there has been no fraud or sharing of the financial benefits, the proposed section removed the dollar limitations contained in the current guidelines and advised that Customs may charge the broker under 19 U.S.C. 1641.

Section (L) of the proposed guidelines covered arriving travelers and consisted of a reordering of the provisions of section (J) of the current guidelines.

Section (M) of the proposed guidelines referred Customs officers to other Federal agencies for recommendations in instances where violations of laws administered by other agencies are discovered. These provisions are the same as those contained in section (K) of the current guidelines.

ANALYSIS OF COMMENTS

The notice of proposed rulemaking invited public comments. The comment period closed on December 28, 1998. Seventeen comments were received. Many commenters applauded Customs efforts to re-organize and simplify the existing guidelines. Nine of the commenters set forth similar concerns and objections to Customs change in the guidelines relating to penalty assessment of customs brokers who violate section 592. Also, eight of the commenters voiced concerns and recommendations regarding the proposed guidelines on a section by section basis. Three commenters also made general comments which were not directly related to a specific section of the proposal.

The specific "section by section" recommendations and/or suggestions, general recommendations and/or suggestions, and the Customs responses to the comments, are set forth below.

PROPOSED INTRODUCTORY PARAGRAPH OF THE GUIDELINES

Comment:

Three commenters object to the language in the introductory paragraph that indicates that "a mitigated penalty is conditioned upon payment of any actual loss of duty as well as *a release by the party that indicates that the mitigation decision constitutes full accord and satisfaction.*" The commenters believe that if other statutory remedies are available to importers, the importers should have the right to pursue those remedies separately and distinctly from the settlement of any civil penalty for violation of section 592.

Also, one commenter takes issue with Customs statement in the introduction that the guidelines "may supplement, and are not intended to preclude application of, any other special guidelines promulgated by Customs." The commenter believes that the language is unclear and would permit Customs to issue, without prior notice, draconian special guidelines to fit the immediate needs of the agency.

Customs Response:

Customs does not agree that an alleged violator who seeks mitigation of a civil penalty initiated by Customs under section 592 is deprived of other statutory remedies or judicial recourse in the event that the party chooses not to comply with the agency decision. In other words, the party *elects* to pay the mitigated amount. The agency must, in turn, sue the party to collect an assessed penalty in the event that the violator decides not to comply with the agency decision. Consequently, given the elective nature of the mitigation proceedings and the availability of judicial recourse, we do not agree with the commenters' objections.

Also, we do not share the commenter 's concern regarding issuance of "special guidelines", inasmuch as these guidelines merely reflect policies issued pursuant to the discretionary authority of the Customs Service pursuant to 19 U.S.C. 1618 to remit and mitigate penalties. As such, the Customs Service may depart from the guidelines as appropriate circumstances warrant, including the application of special guidelines.

PROPOSED SECTION (A) VIOLATIONS OF SECTION 592

Comment:

One commenter takes issue with Customs characterization of "in-bond" movements as encompassed within the language "entry, introduction, or attempted entry or introduction." The commenter believes that the in-bond language is an impermissible expansion of section 592. In the commenter 's view, a mere transportation movement should not be considered an "entry" under section 592 because nothing has been presented to Customs for entry or introduction into the commerce of the United States.

Two commenters express concern regarding Customs discussion of clerical error and pattern of negligent conduct. Specifically, one commenter believes that the section is contradictory because Customs initially states that "an unintentional repetition by an electronic system of an initial clerical error, generally shall not constitute a pattern of negligent conduct" unless Customs has brought the error to the party's attention. In the next sentence the commenter feels that Customs contradicts itself where it is stated that "* * * the unintentional repetition of a clerical mistake over a significant period of time or involving many entries could indicate a pattern of negligent conduct and a failure to exercise reasonable care." Both commenters believe that this language should be clarified.

Customs Response:

With respect to the objection regarding inclusion of "in bond" applications within the meaning of entry, introduction, or attempted entry or introduction, Customs does not believe that such inclusion contradicts either statute or regulation. For example, if merchandise entered under bond is subsequently diverted (*i.e.*, "introduced") into the commerce of the United States contrary to the terms of the bond, the penalty provisions of section 592 may apply.

We also disagree with the two comments relating to Customs language concerning "clerical error" and "pattern of negligent conduct." Clearly, in those cases where Customs calls the error to the attention of the party and the error is not corrected, the party may be subject to potential section 592 penalty. Similarly, in those cases where the repetition of a clerical mistake occurs over a significant period of time or involves many entries, a violation may occur if the facts and circumstances surrounding the transactions indicate a failure to exercise reasonable care. In the latter instance, the proposed language does not mandate assessment of a penalty, but rather, contemplates the possibil-

ity of a penalty depending on the facts and circumstances of the transactions at issue.

PROPOSED SECTION (B) DEFINITION OF MATERIALITY UNDER SECTION 592

Comment:

Three commenters object to Customs definition of materiality as either "too subjective" or not within the scope of section 592. One of the commenters is of the opinion that the Court of Appeals' decision in *Pentax Corp. v. Robinson*, 125 F.3d 1457 (Fed. Cir. 1997), *amended*, 135 F.3d 760 (1998), does not permit Customs to include an importer's liability for marking duties in the agency definition of materiality. Two commenters also expressed concern that the language "whether an unfair trade practice has been committed under the anti-dumping or countervailing duty laws or a similar statute" is too broad and may result in Customs adding its penalty on top of other agencies' statutory remedies. Similarly, one of these commenters also believes that the definition of materiality should not include a determination of whether an unfair act has been committed involving patent, trademark or copyright infringement, in view of other remedies available to Customs for such intellectual property rights infractions. Lastly, one of the commenters believes that the definition's inclusion of "collection and reporting of accurate trade statistics" exceeds the statutory limits of section 592. This commenter is involved with oil and gas importations and is of the opinion that statistical discrepancies for the majority of these products bear no relevance to the entry of such products, and that therefore, Customs definition of materiality should not include statistical errors.

Customs Response:

Customs is of the opinion that the definition of materiality set forth in the proposed guidelines comports with law and judicial precedent. With respect to the inclusion of a marking duties assessment as an example of a "Customs action" that could be influenced by a false statement, omission, or act, in Customs view, the *Pentax* decision does not preclude liability for marking duties in connection with section 592 violations in all cases.

We note that in cases involving either antidumping, other agency or intellectual property rights infractions, the law does not preclude the use of section 592 in appropriate cases, despite the availability of other government remedies. Further, with respect to that part of the definition of materiality involving collection and reporting of accurate trade statistics, we note that there is judicial precedent that supports this aspect of Customs definition.

PROPOSED SECTION (D) DISCUSSION OF ADDITIONAL TERMS

Comment:

Two commenters suggest that Customs include fees and taxes in the definition of loss of duty in the paragraph entitled "(1) Duty Loss Violations" so that there is consistency with the definition of loss of duty as

set forth in the paragraphs entitled "(3) Actual Loss of Duties," and "(4) Potential Loss of Duties." Two other commenters object to including marking duties in the definition of "duty loss" based on the same objections expressed above regarding materiality and the *Pentax* decision.

One commenter is of the opinion that the last sentence in section (D) paragraph (4) "Potential Loss of Duties", should be deleted. The commenter points out that if an entry summary is filed without inclusion of information regarding antidumping or countervailing duty investigations the regulations provide that the entry should be rejected. The commenter believes that such a case should not give rise to a potential loss of duties inasmuch as Customs is not discovering a violation but rather merely enforcing a regulation.

The same commenter suggests that Customs revise section (D) paragraph (6) "Reasonable Care", to include language that failure to follow a binding Customs ruling pertaining to its merchandise evidences a failure to exercise reasonable care.

Customs Response:

Customs agrees that the definition of duty loss set forth in section (D) paragraph (1) "Duty Loss Violations", should be amended to conform to the definition of duty loss set forth in section (D) paragraph (3)" Actual Loss of Duties", and has made the necessary change.

As indicated in our response to comments regarding materiality, section 592 liability may arise in certain cases where the government has been deprived of marking duties. Consequently, Customs believes that the inclusion of marking duties in the definition of duty loss is appropriate.

With regard to the suggestion that Customs delete the last sentence of section (D) paragraph (4) "Potential Loss of Duties", we note that the failure to provide required information on the entry documents may give rise to section 592 liability and that Customs may "discover" such an omission after the filing of the documents. Therefore, it is accurate to state that a potential loss of duties equals the amount of the duties, taxes, and fees that would have occurred had Customs not discovered the violation prior to liquidation and taken steps to correct the entry.

With regard to the commenter's suggestion involving "Reasonable Care", we believe that the suggested revision is unnecessary. Customs notes that the regulations already establish the requirement that an importer who receives a ruling from Customs regarding the tariff classification of merchandise shall set forth in connection with a subsequent entry of that merchandise the tariff classification set forth in the ruling.

PROPOSED SECTION (E) PENALTY ASSESSMENT

Comment:

A commenter recommends that section (E) be revised to require the Customs field officer to include copies of the evidence relied upon for issuance of the prepenalty notice with appropriate deletions based on Freedom of Information Act exemptions. This commenter also believes

that if Customs agrees to a waiver of the statute of limitations, the guidelines should reflect a requirement that the Customs officer signing the waiver has the contractual authority to sign the waiver. Also, the commenter is of the opinion that the guidelines should be amended to require that penalty notices provide explanations why a petitioner's prepenalty response arguments are defective or without merit. Lastly, the commenter believes that the guidelines should require that the Customs field officer promptly notify the alleged violator in cases where the officer has determined that the statute of limitations has expired.

Another commenter questions Customs approach to the "parking ticket" penalties of up to $10,000, set forth in paragraph (E)(1)(c). The commenter believes that $10,000 is an excessive penalty for per entry infractions especially when the case involves a number of entries. The same commenter expresses concern regarding Customs approach to statute of limitations waivers. The commenter is of the opinion that the paragraphs in section (E) relating to statute of limitations waivers override the clear legislative intent underlying the statute of limitations applicable to section 592 violations—*i.e.*, that the agency identify and resolve the violations within a specified period of time. For example, the commenter objects to Customs Headquarters recently requiring agents to obtain waivers of the statute of limitations immediately upon initiating a case.

Another commenter objects to Customs lengthening the time during which Customs can lawfully indicate a degree of culpability and penalty amount higher than were set forth in the original prepenalty notice, without having to issue a new prepenalty notice (*i.e.*, from the current 3 months to the proposed 9 months before expiration of the statute of limitations). The commenter believes that the proposed revision needlessly extends the period of time within which Customs may claim higher levels of culpability without providing the alleged violator full due process. The commenter believes that this proposal provides a strong incentive for Customs to delay its section 592 investigation.

Customs Response:

Customs does not agree with the commenter's recommendation to include copies of evidence with the prepenalty notice. Neither the statute nor corresponding regulations authorize release of evidence at the time of issuance of the prepenalty notice, and to require its production would be tantamount to engaging in unauthorized pre-trial discovery. Also, Customs does not agree with this commenter's suggestions to establish a requirement that the Customs officer signing a waiver of the statute of limitations has the contractual authority to sign such a waiver. Such signing authority already has been established through the appropriate Customs delegation procedures. Moreover, waivers involve the unilateral action of the involved party and such action has nothing to do with any contractual authority with Customs. Further, inasmuch as section 592 does not require the agency to furnish explanations why a prepenalty response is deficient or defective, Customs does not believe

that such a requirement is necessary. In Customs view, the statute provides adequate safeguards for the alleged violator by requiring the agency ultimately to furnish the party with its findings of fact and conclusions of law in the agency decision. Lastly, because the statute of limitations is an affirmative defense available to an alleged violator, we do not agree with the commenter's recommendation that Customs should be required to notify the alleged violator in cases where the statute has expired.

With respect to the commenter's concern regarding Customs approach to technical violations and "parking ticket" penalties of up to $10,000, Customs notes that this paragraph does not mandate a $10,000 fixed sum penalty per entry violation, but rather provides for ranges of fixed sum penalties—generally $1,000 to $2,000 per infraction where there are no prior violations. The higher fixed sum amounts may be appropriate in cases of multiple or repeat violations, and Customs does not believe that these fixed sum amounts are excessive. In response to this commenter's concern regarding statute of limitations waivers, Customs notes that an alleged violator is not required to provide a waiver to Customs, and the guidelines merely serve to advise the alleged violator of the consequences of providing a waiver, as well as the consequences of choosing not to provide a waiver of the statute of limitations. Customs notes that the guidelines, for the most part, reiterate already established regulatory provisions.

Customs also does not agree with the comment raising a due process objection to Customs lengthening the time in which Customs can lawfully indicate a higher degree of culpability and penalty amount than were set forth in the original prepenalty notice without having to issue a new prepenalty notice. Customs notes that the guidelines do not affect the alleged violator's due process rights, inasmuch as the party may file a petition to contest the allegations set forth in the penalty notice. Customs would also like to point out that this provision affects only those few cases where evidence is uncovered at a point in time where the statute of limitations poses a significant concern to the government's ability to timely process the penalty action.

PROPOSED SECTION (F) ADMINISTRATIVE PENALTY DISPOSITION

Comment:

One commenter believes that the penalty dispositions for non-duty loss violations (based on a percentage of the dutiable value) are unfair to importers of duty-free articles. The commenter is of the opinion that the penalty disposition in non-duty loss cases should be under 10 percent of the dutiable value (plus interest), including cases of fraud.

Customs Response:

Customs disagrees. Some of the most egregious violations involve non-dutiable articles (*e.g.*, quota evasion).

PROPOSED SECTION (G) MITIGATING FACTORS

Comment:

Two commenters object to the proposed requirement that "Contributory Customs Error" may only be claimed where the misleading or erroneous advice given by a Customs officer is given in writing. The commenters believe that the writing requirement will have the effect of eliminating the ability to claim this factor, and one of the commenters expresses the view that because the alleged violator has the burden of proof, a writing requirement is unnecessary.

One commenter objects to Customs elimination of "Inexperience in Importing" as a mitigating factor, and believes that the Customs Modernization Act's concept of "reasonable care" suggests that the factor should be included in the guidelines. This commenter also believes that Customs should not require the cooperation with an investigation be "extraordinary" to be entitled to mitigation; that the "inability to obtain jurisdiction" factor should not be eliminated as a mitigating factor and that there should not be an increase in penalties in non-duty loss cases where Customs knew of the infraction but failed to take action.

Finally, with respect to the mitigating factor of "Customs Knowledge" another commenter recommends deletion of the qualifying language "without justification," that precedes the requirement that Customs "failed to inform the violator so that it could have taken earlier corrective action." The commenter is of the opinion that the qualifying language makes the benefit of this factor unobtainable.

Customs Response:

Customs disagrees with the two commenters' objections to the "Contributory Customs Error" writing requirement. In view of the responsibility of the importer to act with reasonable care (as set forth in the Customs Modernization Act), Customs believes it is reasonable to require that the importer demonstrate "Contributory Customs Error" by tangible written evidence.

With regard to the commenter's concern involving the proposal to eliminate "Inexperience in Importing," as a mitigating factor, Customs has reconsidered the proposal and decided to retain the factor. With respect to the commenter's concern regarding cooperation, Customs believes that it is appropriate that the cooperation be extraordinary, as it is expected that the party does more than merely cure the defect or problem that resulted in the violative conduct. Customs also believes that "inability to obtain jurisdiction" (*i.e.*, personal jurisdiction) is a matter that is better addressed at the litigation stage of the proceedings in the event of non-compliance with the agency decision. As for the commenter's question regarding the rationale for increasing the "Customs Knowledge" non-duty loss penalties, we note that the change is being made so that the non-duty loss penalty amounts are consistent with the corresponding duty loss penalty amounts.

Finally, Customs disagrees with the commenter's opinion regarding the suggested deletion of the "without justification" language set forth

in the "Customs Knowledge" mitigating factor. Customs notes that there may be circumstances (such as an open investigation) that warrant delay in notifying the alleged violator of the purported infraction.

PROPOSED SECTION (H) AGGRAVATING FACTORS

Comment:

One commenter believes that because the new proposed aggravating factors of "evading a quota restriction" and "failure to comply with a lawful demand for records" are themselves subject to penalty, these factors should not be considered to increase the penalty or proposed penalty of an alleged violator.

Another commenter expresses reservations about the aggravating factor that involves "textile imports that have been the subject of illegal transshipment, whether or not the merchandise bears false country of origin markings." The commenter asks how goods can be transshipped if they are properly marked—and implies that this factor should be deleted.

Customs Response:

With regard to the first commenter, it should be noted that the guidelines indicate that the "presence of one or more aggravating factors may not be used to raise the level of culpability attributable to the alleged violations, but may be utilized to offset the presence of mitigating factors." Consequently, although we agree that the offenses may be subject to separate penalties, the inclusion of these two aggravating factors do not serve to potentially increase the section 592 penalties, but rather, may serve to offset the presence of mitigating factors in the action.

With respect to the second commenter's question concerning the aggravating factor involving transshipped textile products, Customs notes that the factor's qualifying language indicates "whether or not the merchandise bears **false** country of origin markings." Therefore, although the textile article may not bear a false country of origin marking, it does not necessarily follow that the article is properly marked. For example, an imported textile product may bear no country of origin marking at all, and therefore be improperly marked as well as possibly illegally transshipped.

PROPOSED SECTION (J) SECTION 592(d) DEMANDS

Comment:

One commenter believes that Customs should make it very clear that where an entry has been finally liquidated, that absent proof of a violation of section 592, no further duties may be collected.

Customs Response:

Customs believes that no additional language to the proposed section is warranted inasmuch as the second sentence of the section makes clear that with respect to finally liquidated entries "information must be present establishing a violation of section 592(a)," before a section 592(d) demand may be issued.

PROPOSED SECTION (K) CUSTOMS BROKERS

Comment:

Nine commenters object to the change of Customs position regarding the applicability of section 592 to Customs brokers in "non-fraud" cases and in those cases where the broker does not share in the benefits of the violation to an extent over and above customary brokerage fees. In sum, in these cases, the commenters object to the proposed language requiring that Customs "shall" proceed against the Customs broker pursuant to the remedies provided under 19 U.S.C. 1641. The commenters believe that this language is a clear invitation for Customs field offices to make every suspected negligent violation of section 592 by a broker into a 19 U.S.C. 1641 broker penalty case. Most of the commenters believe that adoption of such a change would result in the maximum $30,000 broker penalty for such infractions. Two of the nine commenters believe that the current broker guidelines should be retained while one of the commenters is of the opinion that Customs should amend the proposed language to provide discretion to local field offices by substituting the words "may" for "shall" before the remaining language "proceed against the Customs broker pursuant to the remedies provided under 19 U.S.C. 1641.

Customs Response:

In view of the comments received in connection with this proposed section, Customs has reconsidered its position and adopted the commenter's suggestion to substitute the word "may" for shall" in the language relating to broker penalty assessment pursuant to 19 U.S.C. 1641. The agency notes that the existing Customs Directive regarding 19 U.S.C. 1641 penalties already provides for incremental assessment of broker penalties in appropriate cases (*e.g.*, initial warning letters). Therefore, Customs believes that apprehensions about immediate $30,000 penalty assessments in every broker negligence case are unwarranted.

PROPOSED SECTION (L) ARRIVING TRAVELERS

Comment:

One commenter believes that this section should be clarified to indicate that alleged violators that are arriving travelers will be assessed only one penalty under either section 592, 19 U.S.C. 1497 or 19 U.S.C. 1595(a) so that the traveler will know how to prepare his or her petition.

Customs Response:

Inasmuch as the law does not provide that section 592 is the exclusive remedy available to the agency in cases involving violations by arriving travelers, the commenter's suggestion cannot be adopted. More than one statute can be violated by the arriving traveler. However, the seizure or penalty notice will indicate the statute underlying the alleged violation.

PROPOSED SECTION (M) VIOLATIONS OF LAWS ADMINISTERED BY OTHER FEDERAL AGENCIES

Comment:

One commenter recommends that this section be clarified so that Customs cannot impose a penalty for the release of seized merchandise for laws administered by other federal agencies.

Customs Response:

Customs notes that in cases where merchandise is legally seized for violations of laws administered by other federal agencies, Customs may, by law, require payment of a penalty in order to remit the forfeiture in appropriate cases. Therefore, we cannot adopt the commenter's suggestion.

GENERAL COMMENTS

Comment:

One commenter recommends the proposed guidelines include a definition of the term "domestic value," since that term is used frequently within the guidelines.

Customs Response:

Customs notes that the term "domestic value" already is defined in the Customs Regulations in 19 CFR 162.43(a) and clearly is applicable to penalty assessments. Therefore, we do not believe that adoption of the commenter's suggestion is warranted.

Comment:

One commenter believes that Customs should explicitly provide that the agency has the authority to mitigate section 592 "interest" penalties in non-fraudulent actual duty loss cases involving a valid prior disclosure. The commenter feels that the proposed guidelines' failure to expressly provide for such mitigation authority diminishes the agency's policy position of encouraging valid prior disclosures.

Customs Response:

Although the language in the proposed guidelines does not explicitly rule out the possibility of affording mitigation in extraordinary cases involving valid prior disclosures, the agency believes that the current language best reflects Congressional intent—namely, that the monetary benefits of a valid prior disclosure are those reduced penalties provided for by law.

Comment:

A commenter suggests that the first sentence of proposed Appendix B providing for remission or mitigation of section 592 penalties pursuant to section 1618 of the Tariff Act of 1930, be added to the Customs Regulations. The commenter believes that the subjects of remission and mitigation discussed in the guidelines are not found in the regulations, and that by including these subjects in the regulations, Customs would

have greater discretion regarding the use and application of the guidelines.

Customs Response:

Customs notes that the regulations already discuss the mitigation and remission authority of the agency in connection with penalties and forfeitures in 19 CFR 162.31.

Comment:

A commenter expresses concern that the proposed guidelines do not explicitly address the situation where a party makes a false statement, or engages in an omission or act that results in the overpayment of duty and taxes. The commenter is unclear whether such a case could result in the imposition of penalties under section 592.

Customs Response:

Customs notes that liability under section 592 may arise in cases involving an overpayment of duty and taxes (*e.g.*, an overpayment to evade a tariff rate quota or an established government trigger-price mechanism). In Customs view, the proposed guidelines adequately addressed these situations. For example, section (F) provides for penalty dispositions for such infractions as non-duty loss violations.

Comment:

One commenter expresses reservations about the Customs field officer's ability to take into account the presence of mitigating factors when considering the issuance of a section 592 prepenalty notice. The commenter believes that this may be an unproductive use of the field officer's time and appears to be premature since the necessary information from the alleged violator has not yet been received.

The commenter also questions the need for sending "information copies" of section 592(d) demands to sureties in all cases except in those cases where less than a year remains under the statute of limitations. In the commenter's view, this can be a time-consuming task for Customs field officers where there are many entries and multiple sureties. The commenter also would like the "shortened response times" discussed in proposed section (E) made applicable to section 592(d) demands.

Finally, this commenter suggests that the "arriving travelers" section be re-lettered and moved closer in location to the section involving liability for penalties so that the Customs officer, in a rushed situation, will not miss the section on arriving travelers because the officer did not read far enough along in the guidelines.

Customs Response:

With respect to the first suggestion, Customs notes that the proposed guidelines set forth that the field officer consider whether mitigating factors are *present* at the pre-penalty stage regardless of the level of culpability. Customs is not instructing the field officer at the pre-penalty stage of the proceedings to manufacture mitigating factors or speculate regarding their existence, but rather is attempting to promote

development of realistic initial penalty assessments commensurate with the level of available evidence.

With respect to the commenter's concern involving the need for furnishing information copies of section 592(d) demands to sureties, Customs believes that in view of statute of limitations concerns associated with section 592(d) demands, and in order to assist sureties in tracking contingent liabilities, the benefits derived from such practice for both the government and the sureties outweighs any administrative burden imposed upon the Customs field office. Also, inasmuch as the Customs regulations do not provide for a shortened response time in connection with section 592(d) demands, the commenter's recommendation is rejected.

Lastly, to reduce the likelihood of the problem discussed in the commenter's last recommendation, we have added a sentence to the end of proposed section (E)(1)(a) to direct parties to the special assessments and dispositions section in cases involving arriving travelers.

CONCLUSION

Accordingly, based on the comments received and the analysis of those comments as set forth above, and after further review of this matter, Customs believes that the proposed revised guidelines should be adopted with the changes discussed above. Certain other clarifying changes are made as well.

REGULATORY FLEXIBILITY ACT

Because this revision of the guidelines relates to rules of agency procedure and policy, and no notice of proposed rulemaking was required pursuant to 5 U.S.C. 553, the document is not subject to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

EXECUTIVE ORDER 12866

Because the document is not regulatory in nature, but merely serves to inform the public about certain agency procedures and practices, the revised guidelines do not meet the criteria for a "significant regulatory action" under E.O. 12866.

LIST OF SUBJECTS

19 CFR Part 171

Customs duties and inspection, Law enforcement, Penalties, Seizures and forfeitures.

AMENDMENT TO THE REGULATIONS

Part 171 of the Customs Regulations (19 CFR part 171) is amended as set forth below:

PART 171—FINES, PENALTIES, AND FORFEITURES

1. The general authority citation for Part 171 continues to read as follows:

Authority: 19 U.S.C. 66, 1592, 1618, 1624. The provisions of subpart C also issued under 22 U.S.C. 401; 46 U.S.C. App. 320 unless otherwise noted.

2. Appendix B to Part 171 is revised to read as follows:

APPENDIX B TO PART 171—CUSTOMS REGULATIONS, GUIDELINES FOR THE IMPOSITION AND MITIGATION OF PENALTIES FOR VIOLATIONS OF 19 U.S.C. 1592.

A monetary penalty incurred under section 592 of the Tariff Act of 1930, as amended (19 U.S.C. 1592; hereinafter referred to as section 592) may be remitted or mitigated under section 618 of the Tariff Act of 1930, as amended (19 U.S.C. 1618), if it is determined that there are mitigating circumstances to justify remission or mitigation. The guidelines below will be used by the Customs Service in arriving at a just and reasonable assessment and disposition of liabilities arising under section 592 within the stated limitations. It is intended that these guidelines shall be applied by Customs officers in pre-penalty proceedings and in determining the monetary penalty assessed in any penalty notice. The assessed penalty or penalty amount set forth in Customs administrative disposition determined in accordance with these guidelines does not limit the penalty amount which the Government may seek in bringing a civil enforcement action pursuant to section 592(e). It should be understood that any mitigated penalty is conditioned upon payment of any actual loss of duty as well as a release by the party that indicates that the mitigation decision constitutes full accord and satisfaction. Further, mitigation decisions are not rulings within the meaning of part 177 of the Customs Regulations (19 CFR part 177). Lastly, these guidelines may supplement, and are not intended to preclude application of, any other special guidelines promulgated by Customs.

(A) VIOLATIONS OF SECTION 592

Without regard to whether the United States is or may be deprived of all or a portion of any lawful duty, tax or fee thereby, a violation of section 592 occurs when a person, through fraud, gross negligence, or negligence, enters, introduces, or attempts to enter or introduce any merchandise into the commerce of the United States by means of any document, electronic transmission of data or information, written or oral statement, or act that is material and false, or any omission that is material; or when a person aids or abets any other person in the entry, introduction, or attempted entry or introduction of merchandise by such means. It should be noted that the language "entry, introduction, or attempted entry or introduction" encompasses placing merchandise in-bond (*e.g.*, filing an immediate transportation application). There is no violation if the falsity or omission is due solely to clerical error or mistake of fact, unless the error or mistake is part of a pattern of negli-

gent conduct. Also, the unintentional repetition by an electronic system of an initial clerical error generally will not constitute a pattern of negligent conduct. Nevertheless, if Customs has drawn the party's attention to the unintentional repetition by an electronic system of an initial clerical error, subsequent failure to correct the error could constitute a violation of section 592. Also, the unintentional repetition of a clerical mistake over a significant period of time or involving many entries could indicate a pattern of negligent conduct and a failure to exercise reasonable care.

(B) DEFINITION OF MATERIALITY UNDER SECTION 592.

A document, statement, act, or omission is material if it has the natural tendency to influence or is capable of influencing agency action including, but not limited to a Customs action regarding: (1) determination of the classification, appraisement, or admissibility of merchandise (*e.g.*, whether merchandise is prohibited or restricted); (2) determination of an importer's liability for duty (including marking, antidumping, and/or countervailing duty); (3) collection and reporting of accurate trade statistics; (4) determination as to the source, origin, or quality of merchandise; (5) determination of whether an unfair trade practice has been committed under the anti-dumping or countervailing duty laws or a similar statute; (6) determination of whether an unfair act has been committed involving patent, trademark, or copyright infringement; or (7) the determination of whether any other unfair trade practice has been committed in violation of federal law. The "but for" test of materiality is inapplicable under section 592.

(C) DEGREES OF CULPABILITY UNDER SECTION 592

The three degrees of culpability under section 592 for the purposes of administrative proceedings are:

(1) *Negligence.* A violation is determined to be negligent if it results from an act or acts (of commission or omission) done through either the failure to exercise the degree of reasonable care and competence expected from a person in the same circumstances either: (a) in ascertaining the facts or in drawing inferences therefrom, in ascertaining the offender's obligations under the statute; or (b) in communicating information in a manner so that it may be understood by the recipient. As a general rule, a violation is negligent if it results from failure to exercise reasonable care and competence: (a) to ensure that statements made and information provided in connection with the importation of merchandise are complete and accurate; or (b) to perform any material act required by statute or regulation.

(2) *Gross Negligence.* A violation is deemed to be grossly negligent if it results from an act or acts (of commission or omission) done with actual knowledge of or wanton disregard for the relevant facts and with indifference to or disregard for the offender's obligations under the statute.

(3) *Fraud*. A violation is determined to be fraudulent if a material false statement, omission, or act in connection with the transaction was committed (or omitted) knowingly, *i.e.*, was done voluntarily and intentionally, as established by clear and convincing evidence.

(D) Discussion of Additional Terms

(1) *Duty Loss Violations*. A section 592 duty loss violation involves those cases where there has been a loss of duty including any marking, anti-dumping, or countervailing duties, or any tax and fee (*e.g.*, merchandise processing and/or harbor maintenance fees) attributable to an alleged violation.

(2) *Non-duty Loss Violations*. A section 592 non-duty loss violation involves cases where the record indicates that an alleged violation is principally attributable to, for example, evasion of a prohibition, restriction, or other non-duty related consideration involving the importation of the merchandise.

(3) *Actual Loss of Duties*. An actual loss of duty occurs where there is a loss of duty including any marking, anti-dumping, or countervailing duties, or any tax and fee (*e.g.*, merchandise processing and/or harbor maintenance fees) attributable to a liquidated Customs entry, and the merchandise covered by the entry has been entered or introduced (or attempted to be entered or introduced) in violation of section 592.

(4) *Potential Loss of Duties*. A potential loss of duty occurs where an entry remains unliquidated and there is a loss of duty, including any marking, anti-dumping or countervailing duties or any tax and fee (*e.g.*, merchandise processing and/or harbor maintenance fees) attributable to a violation of section 592, but the violation was discovered prior to liquidation. In addition, a potential loss of duty exists where Customs discovers the violation and corrects the entry to reflect liquidation at the proper classification and value. In other words, the potential loss in such cases equals the amount of duty, tax and fee that would have occurred had Customs not discovered the violation prior to liquidation and taken steps to correct the entry.

(5) *Total Loss of Duty*. The total loss of duty is the sum of any actual and potential loss of duty attributable to alleged violations of section 592 in a particular case. Payment of any actual and/or potential loss of duty shall not affect or reduce the total loss of duty used for assessing penalties as set forth in these guidelines. The "multiples" set forth below in paragraph (F)(2) involving assessment and disposition of cases shall utilize the "total loss of duty" amount in arriving at the appropriate assessment or disposition.

(6) *Reasonable Care*. General Standard: All parties, including importers of record or their agents, are required to exercise reasonable care in fulfilling their responsibilities involving entry of merchandise. These responsibilities include, but are not limited to: providing a classification and value for the merchandise; furnishing information sufficient to permit Customs to determine the final classification and valuation of merchandise; taking measures that will lead to and assure

the preparation of accurate documentation, and determining whether any applicable requirements of law with respect to these issues are met. In addition, all parties, including the importer, must use reasonable care to provide accurate information or documentation to enable Customs to determine if the merchandise may be released. Customs may consider an importer's failure to follow a binding Customs ruling a lack of reasonable care. In addition, unreasonable classification will be considered a lack of reasonable care (*e.g.*, imported snow skis are classified as water skis). Failure to exercise reasonable care in connection with the importation of merchandise may result in imposition of a section 592 penalty for fraud, gross negligence or negligence.

(7) *Clerical Error.* A clerical error is an error in the preparation, assembly or submission of import documentation or information provided to Customs that results from a mistake in arithmetic or transcription that is not part of a pattern of negligence. The mere non-intentional repetition by an electronic system of an initial clerical error does not constitute a pattern of negligence. Nevertheless, as stated earlier, if Customs has drawn a party's attention to the non-intentional repetition by an electronic system of an initial clerical error, subsequent failure to correct the error could constitute a violation of section 592. Also, the unintentional repetition of a clerical mistake over a significant period of time or involving many entries could indicate a pattern of negligent conduct and a failure to exercise reasonable care.

(8) *Mistake of Fact.* A mistake of fact is a false statement or omission that is based on a bona fide erroneous belief as to the facts, so long as the belief itself did not result from negligence in ascertaining the accuracy of the facts.

(E) Penalty Assessment

(1) *Case Initiation—Pre-penalty Notice.*

(a) *Generally.* As provided in section 162.77, Customs Regulations (19 CFR 162.77), if the appropriate Customs field officer has reasonable cause to believe that a violation of section 592 has occurred and determines that further proceedings are warranted, the Customs field officer will issue to each person concerned a notice of intent to issue a claim for a monetary penalty (*i.e.*, the "pre-penalty notice"). In issuing such a pre-penalty notice, the Customs field officer will make a tentative determination of the degree of culpability and the amount of the proposed claim. Payment of any actual and/or potential loss of duty will not affect or reduce the total loss of duty used for assessing penalties as set forth in these guidelines. The "multiples" set forth in paragraphs (F)(2)(a)(i), (b)(i) and (c)(i) involving assessment and disposition of duty loss violation cases will use the amount of total loss of duty in arriving at the appropriate assessment or disposition. Further, where separate duty loss and non-duty loss violations occur on the same entry, it is within the Customs field officer's discretion to assess both duty loss and non-duty loss penalties, or only one of them. Where only one of the penalties is assessed, the Customs field officer has the discretion to select which

penalty (duty loss or non-duty loss) shall be assessed. Also, where there is a violation accompanied by an incidental or nominal loss of duties, the Customs field officer may assess a non-duty loss penalty where the incidental or nominal duty loss resulted from a separate non-duty loss violation. The Customs field officer will propose a level of culpability in the pre-penalty notice that conforms to the level of culpability suggested by the evidence at the time of issuance. Moreover, the pre-penalty notice will include a statement that it is Customs practice to base its actions on the earliest point in time that the statute of limitations may be asserted (*i.e.*, the date of occurrence of the alleged violation) inasmuch as the final resolution of a case in court may be less than a finding of fraud. A pre-penalty notice that is issued to a party in a case where Customs determines a claimed prior disclosure is not valid—owing to the disclosing party's knowledge of the commencement of a formal investigation of a disclosed violation—will include a copy of a written document that evidences the commencement of a formal investigation. In addition, a pre-penalty notice is not required if a violation involves a non-commercial importation or if the proposed claim does not exceed $1,000. Special guidelines relating to penalty assessment and dispositions involving "Arriving Travelers," are set forth in section (L) below.

(b) *Pre-penalty Notice—Proposed Claim Amount.*

(i) *Fraud.* In general, if a violation is determined to be the result of fraud, the proposed claim ordinarily will be assessed in an amount equal to the domestic value of the merchandise. Exceptions to assessing the penalty at the domestic value may be warranted in unusual circumstances such as a case where the domestic value of the merchandise is disproportionately high in comparison to the loss of duty attributable to an alleged violation (*e.g.*, a total loss of duty of $10,000 involving 10 entries with a total domestic value of $2,000,000). Also, it is incumbent upon the appropriate Customs field officer to consider whether mitigating factors are present warranting a reduction in the customary domestic value assessment. In all section 592 cases of this nature regardless of the dollar amount of the proposed claim, the Customs field officer will obtain the approval of the Penalties Branch at Headquarters prior to issuance of a pre-penalty notice at an amount less than domestic value.

(ii) *Gross Negligence and Negligence.* In determining the amount of the proposed claim in cases involving gross negligence and negligence, the appropriate Customs field officer will take into account the gravity of the offense, the amount of loss of duty, the extent of wrongdoing, mitigating or aggravating factors, and other factors bearing upon the seriousness of a violation, but in no case will the assessed penalty exceed the statutory ceilings prescribed in section 592. In cases involving gross negligence and negligence, penalties equivalent to the ceilings stated in paragraphs (F)(2)(b) and (c) regarding disposition of cases may be appropriate in cases involving serious violations, *e.g.*, violations involving a high loss of duty or significant evasion of import prohibitions or re-

strictions. A "serious" violation need not result in a loss of duty. The violation may be serious because it affects the admissibility of merchandise or the enforcement of other laws, as in the case of quota evasions, false statements made to conceal the dumping of merchandise, or violations of exclusionary orders of the International Trade Commission.

(c) *Technical Violations*. Violations where the loss of duty is nonexistent or minimal and/or that have an insignificant impact on enforcement of the laws of the United States may justify a proposed penalty in a fixed amount not related to the value of merchandise, but an amount believed sufficient to have a deterrent effect: *e.g.*, violations involving the subsequent sale of merchandise or vehicles entered for personal use; violations involving failure to comply with declaration or entry requirements that do not change the admissibility or entry status of merchandise or its appraised value or classification; violations involving the illegal diversion to domestic use of instruments of international traffic; and local point-to-point traffic violations. Generally, a penalty in a fixed amount ranging from $1,000 to $2,000 is appropriate in cases where there are no prior violations of the same kind. However, fixed sums ranging from $2,000 to $10,000 may be appropriate in the case of multiple or repeated violations. Fixed sum penalty amounts are not subject to further mitigation and may not exceed the maximum amounts stated in section 592 and in these guidelines.

(d) *Statute of Limitations Considerations—Waivers*. Prior to issuance of any section 592 pre-penalty notice, the appropriate Customs field officer will calculate the statute of limitations attributable to an alleged violation. Inasmuch as section 592 cases are reviewed de novo by the Court of International Trade, the statute of limitations calculation in cases alleging fraud should assume a level of culpability of gross negligence or negligence, *i.e.*, ordinarily applying a shorter period of time for statute of limitations purposes. In accordance with section 162.78 of the Customs Regulations (19 CFR 162.78), if less than 1 year remains before the statute of limitations may be raised as a defense, a shortened response time may be specified in the notice—but in no case, less than 7 business days from the date of mailing. In cases of shortened response times, the Customs field officer should notify alleged violators by telephone and use all reasonable means (*e.g.*, facsimile transmission of a copy of the notice) to expedite receipt of the notice by the alleged violators. Also in such cases, the appropriate Customs field officer should advise the alleged violator that additional time to respond to the pre-penalty notice will be granted only if an acceptable waiver of the statute of limitations is submitted to Customs. With regard to waivers of the statute of limitations, it is Customs practice to request waivers concurrently both from all potential alleged violators and their sureties.

(2) *Closure of Case or Issuance of Penalty Notice*.

(a) *Case Closure*. The appropriate Customs field officer may find, after consideration of the record in the case, including any pre-penalty re-

sponse/oral presentation, that issuance of a penalty notice is not warranted. In such cases, the Customs field officer will provide written notification to the alleged violator who received the subject pre-penalty notice that the case is closed.

(b) *Issuance of Penalty Notice.* In the event that circumstances warrant issuance of a notice of penalty pursuant to section 162.79 of the Customs Regulations (19 CFR 162.79), the appropriate Customs field officer will give consideration to all available evidence with respect to the existence of material false statements or omissions (including evidence presented by an alleged violator), the degree of culpability, the existence of a prior disclosure, the seriousness of the violation, and the existence of mitigating or aggravating factors. In cases involving fraud, the penalty notice will be in the amount of the domestic value of the merchandise unless a lesser amount is warranted as described in paragraph (E)(1)(b)(i). In general, the degree of culpability or proposed penalty amount stated in a pre-penalty notice will not be increased in the penalty notice. If, subsequent to the issuance of a pre-penalty notice and upon further review of the record, the appropriate Customs field officer determines that a higher degree of culpability exists, the original pre-penalty notice should be rescinded and a new pre-penalty notice issued that indicates the higher degree of culpability and increased proposed penalty amount. However, if less than 9 months remain before expiration of the statute of limitations or any waiver thereof by the party named in the pre-penalty notice, the higher degree of culpability and higher penalty amount may be indicated in the notice of penalty without rescinding the earlier pre-penalty notice. In such cases, the Customs field officer will consider whether a lower degree of culpability is appropriate or whether to change the information contained in the pre-penalty notice.

(c) *Statute of Limitations Considerations.* Prior to issuance of any section 592 penalty notice, the appropriate Customs field officer again shall calculate the statute of limitations attributable to the alleged violation and request a waiver(s) of the statute, if necessary. In accordance with Part 171 of the Customs Regulations (19 CFR Part 171), if less than 180 days remain before the statute of limitations may be raised as a defense, a shortened response time may be specified in the notice—but in no case less than 7 business days from the date of mailing. In such cases, the Customs field officer should notify an alleged violator by telephone and use all reasonable means (*e.g.*, facsimile transmission of a copy) to expedite receipt of the penalty notice by the alleged violator. Also, in such cases, the Customs field officer should advise an alleged violator that, if an acceptable waiver of the statute of limitations is provided, additional time to respond to the penalty notice may be granted.

(F) Administrative Penalty Disposition

(1) *Generally.* It is the policy of the Department of the Treasury and the Customs Service to grant mitigation in appropriate circumstances.

In certain cases, based upon criteria to be developed by Customs, mitigation may take an alternative form, whereby a violator may eliminate or reduce his or her section 592 penalty liability by taking action(s) to correct problems that caused the violation. In any case, in determining the administrative section 592 penalty disposition, the appropriate Customs field officer will consider the entire case record—taking into account the presence of any mitigating or aggravating factors. All such factors should be set forth in the written administrative section 592 penalty decision. Once again, Customs emphasizes that any penalty liability which is mitigated is conditioned upon payment of any actual loss of duty in addition to that penalty as well as a release by the party that indicates that the mitigation decision constitutes full accord and satisfaction. Finally, section 592 penalty dispositions in duty-loss and non-duty-loss cases will proceed in the manner set forth below.

(2) *Dispositions*.

(a) *Fraudulent Violation*. Penalty dispositions for a fraudulent violation will be calculated as follows:

(i) *Duty Loss Violation*. An amount ranging from a minimum of 5 times the total loss of duty to a maximum of 8 times the total loss of duty—but in any such case the amount may not exceed the domestic value of the merchandise. A penalty disposition greater than 8 times the total loss of duty may be imposed in a case involving an egregious violation, or a public health and safety violation, or due to the presence of aggravating factors, but again, the amount may not exceed the domestic value of the merchandise.

(ii) *Non-Duty Loss Violation*. An amount ranging from a minimum of 50 percent of the dutiable value to a maximum of 80 percent of the dutiable value of the merchandise. A penalty disposition greater than 80 percent of the dutiable value may be imposed in a case involving an egregious violation, or a public health and safety violation, or due to the presence of aggravating factors, but the amount may not exceed the domestic value of the merchandise.

(b) *Grossly Negligent Violation*. Penalty dispositions for a grossly negligent violation shall be calculated as follows:

(i) *Duty Loss Violation*. An amount ranging from a minimum of 2.5 times the total loss of duty to a maximum of 4 times the total loss of duty—but in any such case, the amount may not exceed the domestic value of the merchandise.

(ii) *Non-Duty Loss Violation*. An amount ranging from a minimum of 25 percent of the dutiable value to a maximum of 40 percent of the dutiable value of the merchandise—but in any such case, the amount may not exceed the domestic value of the merchandise.

(c) *Negligent Violation*. Penalty dispositions for a negligent violation shall be calculated as follows:

(i) *Duty Loss Violation*. An amount ranging from a minimum of 0.5 times the total loss of duty to a maximum of 2 times the total loss of

duty but, in any such case, the amount may not exceed the domestic value of the merchandise.

(ii) *Non-Duty Loss Violation.* An amount ranging from a minimum of 5 percent of the dutiable value to a maximum of 20 percent of the dutiable value of the merchandise, but, in any such case, the amount may not exceed the domestic value of the merchandise.

(d) *Authority to Cancel Claim.* Upon issuance of a penalty notice, Customs has set forth its formal monetary penalty claim. Except as provided in 19 CFR Part 171, in those section 592 cases within the administrative jurisdiction of the concerned Customs field office, the appropriate Customs field officer will cancel any such formal claim whenever it is determined that an essential element of the alleged violation is not established by the agency record, including pre-penalty and penalty responses provided by the alleged violator. Except as provided in 19 CFR Part 171, in those section 592 cases within Customs Headquarters jurisdiction, the appropriate Customs field officer will cancel any such formal claim whenever it is determined that an essential element of the alleged violation is not established by the agency record, and such cancellation action precedes the date of the Customs field officer's receipt of the alleged violator's petition responding to the penalty notice. On and after the date of Customs receipt of the petition responding to the penalty notice, jurisdiction over the action rests with Customs Headquarters including the authority to cancel the claim.

(e) *Remission of Claim.* If the Customs field officer believes that a claim for monetary penalty should be remitted for a reason not set forth in these guidelines, the Customs field officer should first seek approval from the Chief, Penalties Branch, Customs Service Headquarters.

(f) *Prior Disclosure Dispositions.* It is the policy of the Department of the Treasury and the Customs Service to encourage the submission of valid prior disclosures that comport with the laws, regulations, and policies governing this provision of section 592. Customs will determine the validity of the prior disclosure including whether or not the prior disclosure sets forth all the required elements of a violation of section 592. A valid prior disclosure warrants the imposition of the reduced Customs civil penalties set forth below:

(1) *Fraudulent Violation.*

(a) *Duty Loss Violation.* The claim for monetary penalty shall be equal to 100 percent of the total loss of duty (*i.e.*, actual + potential) resulting from the violation. No mitigation will be afforded.

(b) *Non-Duty Loss Violation.* The claim for monetary penalty shall be equal to 10 percent of the dutiable value of the merchandise in question. No mitigation will be afforded.

(2) *Gross Negligence and Negligence Violation.*

(a) *Duty Loss Violation.* The claim for monetary penalty shall be equal to the interest on the actual loss of duty computed from the date of liquidation to the date of the party's tender of the actual loss of duty resulting from the violation. Customs notes that there is no monetary

penalty in these cases if the duty loss is potential in nature. Absent extraordinary circumstances, no mitigation will be afforded.

(b) *Non-Duty Loss Violation.* There is no monetary penalty in such cases and any claim for monetary penalty which had been issued prior to the decision granting prior disclosure will be remitted in full.

(G) Mitigating Factors

The following factors will be considered in mitigation of the proposed or assessed penalty claim or the amount of the administrative penalty decision, provided that the case record sufficiently establishes their existence. The list is not all-inclusive.

(1) *Contributory Customs Error.* This factor includes misleading or erroneous advice given by a Customs official *in writing* to the alleged violator, or established by a contemporaneously created written Customs record, only if it appears that the alleged violator reasonably relied upon the information and the alleged violator fully and accurately informed Customs of all relevant facts. The concept of comparative negligence may be utilized in determining the weight to be assigned to this factor. If it is determined that the Customs error was the sole cause of the violation, the proposed or assessed penalty claim shall be canceled. If the Customs error contributed to the violation, but the violator also is culpable, the Customs error will be considered as a mitigating factor.

(2) *Cooperation with the Investigation.* To obtain the benefits of this factor, the violator must exhibit extraordinary cooperation beyond that expected from a person under investigation for a Customs violation. Some examples of the cooperation contemplated include assisting Customs officers to an unusual degree in auditing the books and records of the violator (*e.g.*, incurring extraordinary expenses in providing computer runs solely for submission to Customs to assist the agency in cases involving an unusually large number of entries and/or complex issues). Another example consists of assisting Customs in obtaining additional information relating to the subject violation or other violations. Merely providing the books and records of the violator should not be considered cooperation justifying mitigation inasmuch as Customs has the right to examine an importer's books and records pursuant to 19 U.S.C. 1508–1509.

(3) *Immediate Remedial Action.* This factor includes the payment of the actual loss of duty prior to the issuance of a penalty notice and within 30 days after Customs notifies the alleged violator of the actual loss of duties attributable to the alleged violation. In appropriate cases, where the violator provides evidence that immediately after learning of the violation, substantial remedial action was taken to correct organizational or procedural defects, immediate remedial action may be granted as a mitigating factor. Customs encourages immediate remedial action to ensure against future incidents of non-compliance.

(4) *Inexperience in Importing.* Inexperience is a factor only if it contributes to the violation and the violation is not due to fraud or gross negligence.

(5) *Prior Good Record*. Prior good record is a factor only if the alleged violator is able to demonstrate a consistent pattern of importations without violation of section 592, or any other statute prohibiting false or fraudulent importation practices. This factor will not be considered in alleged fraudulent violations of section 592.

(6) *Inability to Pay the Customs Penalty*. The party claiming the existence of this factor must present documentary evidence in support thereof, including copies of income tax returns for the previous 3 years, and an audited financial statement for the most recent fiscal quarter. In certain cases, Customs may waive the production of an audited financial statement or may request alternative or additional financial data in order to facilitate an analysis of a claim of inability to pay (*e.g.*, examination of the financial records of a foreign entity related to the U.S. company claiming inability to pay).

(7) *Customs Knowledge*. Additional relief in non-fraud cases (which also are not the subject of a criminal investigation) will be granted if it is determined that Customs had actual knowledge of a violation and, without justification, failed to inform the violator so that it could have taken earlier corrective action. In such cases, if a penalty is to be assessed involving repeated violations of the same kind, the maximum penalty amount for violations occurring after the date on which actual knowledge was obtained by Customs will be limited to two times the loss of duty in duty-loss cases or twenty percent of the dutiable value in non-duty-loss cases if the continuing violations were the result of gross negligence, or the lesser of one time the loss of duty in duty-loss cases or ten percent of dutiable value in non-duty-loss cases if the violations were the result of negligence. This factor will not be applicable when a substantial delay in the investigation is attributable to the alleged violator.

(H) Aggravating Factors

Certain factors may be determined to be aggravating factors in calculating the amount of the proposed or assessed penalty claim or the amount of the administrative penalty decision. The presence of one or more aggravating factors may not be used to raise the level of culpability attributable to the alleged violations, but may be utilized to offset the presence of mitigating factors. The following factors will be considered "aggravating factors," provided that the case record sufficiently establishes their existence. The list is not exclusive.

(1) Obstructing an investigation or audit,

(2) Withholding evidence,

(3) Providing misleading information concerning the violation,

(4) Prior substantive violations of section 592 for which a final administrative finding of culpability has been made,

(5) Textile imports that have been the subject of illegal transshipment (*i.e.*, false country of origin declaration), whether or not the merchandise bears false country of origin markings,

(6) Evidence of a motive to evade a prohibition or restriction on the admissibility of the merchandise (*e.g.*, evading a quota restriction),

(7) Failure to comply with a lawful demand for records or a Customs summons.

(I) OFFERS IN COMPROMISE ("SETTLEMENT OFFERS")

Parties who wish to submit a civil offer in compromise pursuant to 19 U.S.C. 1617 (also known as a "settlement offer") in connection with any section 592 claim or potential section 592 claim should follow the procedures outlined in section 161.5 of the Customs Regulations (19 CFR 161.5). Settlement offers do not involve "mitigation" of a claim or potential claim, but rather "compromise" an action or potential action where Customs evaluation of potential litigation risks, or the alleged violator's financial position, justifies such a disposition. In any case where a portion of the offered amount represents a tender of unpaid duties, taxes and fees, Customs letter of acceptance may identify the portion representing any such duty, tax and fee. The offered amount should be deposited at the Customs field office responsible for handling the section 592 claim or potential section 592 claim. The offered amount will be held in a suspense account pending acceptance or rejection of the offer in compromise. In the event the offer is rejected, the concerned Customs field office will promptly initiate a refund of the money deposited in the suspense account to the offeror.

(J) SECTION 592(d) DEMANDS

Section 592(d) demands for actual losses of duty ordinarily are issued in connection with a penalty action, or as a separate demand without an associated penalty action. In either case, information must be present establishing a violation of section 592(a). In those cases where the appropriate Customs field officer determines that issuance of a penalty under section 592 is not warranted (notwithstanding the presence of information establishing a violation of section 592(a)), but that circumstances do warrant issuance of a demand for payment of an actual loss of duty pursuant to section 592(d), the Customs field officer shall follow the procedures set forth in section 162.79b of the Customs Regulations (19 CFR 162.79b). Except in cases where less than one year remains before the statute of limitations may be raised as a defense, information copies of all section 592(d) demands should be sent to all concerned sureties and the importer of record if such party is not an alleged violator. Also, except in cases where less than one year remains before the statute of limitations may be raised as a defense, Customs will endeavor to issue all section 592(d) demands to concerned sureties and non-violator importers of record only after default by principals.

(K) CUSTOMS BROKERS

If a customs broker commits a section 592 violation and the violation involves fraud, or the broker commits a grossly negligent or negligent violation and shares in the benefits of the violation to an extent over and above customary brokerage fees, the customs broker will be subject to these guidelines. However, if the customs broker commits either a grossly negligent or negligent violation of section 592 (without sharing

in the benefits of the violation as described above), the concerned Customs field officer may proceed against the customs broker pursuant to the remedies provided under 19 U.S.C. 1641.

(L) ARRIVING TRAVELERS

(1) *Liability.* Except as set forth below, proposed and assessed penalties for violations by an arriving traveler must be determined in accordance with these guidelines.

(2) *Limitations on Liability on Non-commercial Violations.* In the absence of a referral for criminal prosecution, monetary penalties assessed in the case of an alleged first-offense, non-commercial, fraudulent violation by an arriving traveler will generally be limited as follows:

(a) *Fraud—Duty Loss Violation.* An amount ranging from a minimum of three times the loss of duty to a maximum of five times the loss of duty, provided the loss of duty is also paid;

(b) *Fraud—Non-duty Loss Violation.* An amount ranging from a minimum of 30 percent of the dutiable value of the merchandise to a maximum of 50 percent of its dutiable value;

(c) *Gross Negligence—Duty Loss Violation.* An amount ranging from a minimum of 1.5 times the loss of duty to a maximum of 2.5 times the loss of duty provided the loss of duty is also paid;

(d) *Gross Negligence—Non-duty Loss Violation.* An amount ranging from a minimum of 15 percent of the dutiable value of the merchandise to a maximum of 25 percent of its dutiable value;

(e) *Negligence—Duty Loss Violation.* An amount ranging from a minimum of .25 times the loss of duty to a maximum of 1.25 times the loss of duty provided that the loss of duty is also paid;

(f) *Negligence—Non-duty Loss Violation.* An amount ranging from a minimum of 2.5 percent of the dutiable value of the merchandise to a maximum of 12.5 percent of its dutiable value;

(g) *Special Assessments/Dispositions.* No penalty action under section 592 will be initiated against an arriving traveler if the violation is not fraudulent or commercial, the loss of duty is $100.00 or less, and there are no other concurrent or prior violations of section 592 or other statutes prohibiting false or fraudulent importation practices. However, all lawful duties, taxes and fees will be collected. Also, no penalty under section 592 will be initiated against an arriving traveler if the violation is not fraudulent or commercial, there are no other concurrent or prior violations of section 592, and a penalty is not believed necessary to deter future violations or to serve a law enforcement purpose.

(M) VIOLATIONS OF LAWS ADMINISTERED BY OTHER FEDERAL AGENCIES.

Violations of laws administered by other federal agencies (such as the Food and Drug Administration, Consumer Product Safety Commission, Office of Foreign Assets Control, Department of Agriculture, Fish and Wildlife Service) should be referred to the appropriate agency for its recommendation. Such recommendation, if promptly tendered, will

be given due consideration, and may be followed provided the recommendation would not result in a disposition inconsistent with these guidelines.

(N) SECTION 592 VIOLATIONS BY SMALL ENTITIES

In compliance with the mandate of the Small Business Regulatory Enforcement Fairness Act of 1996, under appropriate circumstances, the issuance of a penalty under section 592 may be waived for businesses qualifying as small business entities. Procedures established for small business entities regarding violations of 19 U.S.C. 1592 were published as Treasury Decision 97–46 in the Federal Register (62 FR 30378) on June 3, 1997.

RAYMOND W. KELLY,
Commissioner of Customs.

Approved: June 19, 2000.

JOHN P. SIMPSON,
Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, June 23, 2000 (65 FR 39087)]

(T.D. 00–42)

SYNOPSES OF DRAWBACK RULINGS

The following are synopses of drawback rulings approved February 4, 1999, to April 21, 2000, inclusive, pursuant to Subparts A & B, Part 191 of the Customs Regulations.

In the synopses below are listed for each drawback ruling approved under 19 U.S.C. 1313(b), the name of the company, the specified articles on which drawback is authorized, the merchandise which will be used to manufacture or produce these articles, the date the application was signed, the Port Director to whom the ruling was forwarded to or approved by, the date on which it was approved and the ruling number.

Dated: June 21, 2000.

WILLAIM G. ROSOFF,
(for John Durant, Director,
Commercial Rulings Division.)

(A) Company: Acordis Industrial Fibers Inc.
Articles: Coated tire-cord fabric of polyester
Merchandise: Diolen® 2650T–5 (tire-cord fabric)
Application signed: February 3, 2000
Ruling Forwarded to PD of Customs: New York, April 7, 2000
Effect on other rulings: None
Ruling: 44–05925–000

(B) Company: Aventis Animal Nutrition, Inc.
Articles: Not modified
Merchandise: Not modified
Supplemental Application signed: March 10, 2000
Modification approved by PD of Customs in accordance with §191.8(g)(2): New York, April 10, 2000
Effect on other rulings: Modifies T.D. 99–47–S; 44–04899–001 to cover change in company name from Rhône-Poulenc Animal Nutrition, Inc.
Ruling: 44–04899–002

(C) Company: Ball Plastic Container Corp.
Articles: Polyethylene terephthalate (PET) preforms and containers
Merchandise: Polyethylene terephthalate (PET bottle resin)
Application signed: March 24, 2000
Ruling Forwarded to PD of Customs: San Francisco, March 29, 2000
Effect on other rulings: None
Ruling: 44–05917–000

(D) Company: BP Amoco Chemical Co.
Articles: Not modified
Merchandise: Not modified
Supplemental Application signed: September 3, 1999
Modification approved by PD of Customs in accordance with §191.8(g)(2): Houston, December 10, 1999
Effect on other rulings: Modifies T.D. 87–100(3), 44–00145–000 to cover change in company name from Amoco Chemical Corp.
Ruling: 44–00145–001

(E) Company: Chevron Chemical Company LLC
Articles: Engine oil additives
Merchandise: Lubricating oil additives (OLOA 225, 260, 270, 270M, 411, 200, 219C, and 2508J)
Application signed: August 19, 1999
Ruling Forwarded to PDs of Customs: Houston, San Francisco & New York, April 13, 2000
Effect on other rulings: None
Ruling: 44–05930–000

(F) Company: Ciba Specialty Chemicals Corp.
Articles: Various quinacridone pigments
Merchandise: Pigment violet 19
Application signed: February 5, 1999
Ruling forwarded to the PD of Customs: New York, April 6, 2000
Effect on other rulings: None
Ruling: 44–05920–000

(G) Company: Delano Growers Grape Products
Articles: Pasteurized white grape juice concentrate
Merchandise: White grape juice concentrate
Application signed: December 20, 1999
Ruling Forwarded to PD of Customs: San Francisco, April 7, 2000
Effect on other rulings: None
Ruling: 44–05922–000

(H) Company: Eastman Chemical Co.
Articles: Isobutyraldehyde (IHBU)
Merchandise: Propylene
Application signed: November 16, 1999
Ruling Forwarded to PDs of Customs: Houston, San Francisco & New York, April 11, 2000
Effect on other rulings: None
Ruling: 44–05926–000

(I) Company: Eastman Chemical Co.
Articles: n-butyraldehyde (NHBU) a/k/a normal-butyraldehyde
Merchandise: Propylene
Application signed: November 16, 1999
Ruling Forwarded to PDs of Customs: Houston, San Francisco & New York, April 11, 2000
Effect on other rulings: None
Ruling: 44–05927–000

(J) Company: Flexsys America L.P.
Articles: Duralink HTS (hexamethylene-1,6-bis(thiosulphate), disodium salt, dihydrate)
Merchandise: 1,6-dichlorohexane
Application signed: June 11, 1999
Ruling Forwarded to PD of Customs: Boston, April 7, 2000
Effect on other rulings: None
Ruling: 44–05923–000

(K) Company: GB Biosciences Corp.
Articles: Not modified
Merchandise: Not modified
Supplemental Application signed: October 28, 1998
Modification approved by PD of Customs in accordance with §191.8(g)(2): New York, July 29, 1999
Effect on other rulings: Modifies T.D. 95–66–P; 44–04300–000 to cover change in company name from ISK Biosciences Corporation
Ruling: 44–04300–001

(L) Company: Goodyear Tire & Rubber Co.
Articles: Tires
Merchandise: Diolen® 2650T–5 (dipped tire-cord fabric)
Application signed: February 7, 2000
Ruling Forwarded to PD of Customs: New York, April 7, 2000
Effect on other rulings: None
Ruling: 44–05924–000

(M) Company: Grapeco
Articles: Pasteurized grape juice concentrate and blended grape juice concentrates
Merchandise: Red and white grape juice concentrates
Application signed: February 22, 2000
Ruling Forwarded to PD of Customs: San Francisco, April 7, 2000
Effect on other rulings: None
Ruling: 44–05921–000

(N) Company: Imation Corp.
Articles: Magnetic recording tape in data cartridges
Merchandise: PET and PEN polyester films; metal tape guides
Application signed: November 12, 1999
Ruling Forwarded to PD of Customs: San Francisco, April 21, 2000
Effect on other rulings: None
Ruling: 44–05934–000

(O) Company: MMC Technology Inc.
Articles: Magnetic disc media
Merchandise: Aluminum substrates; nickel plated aluminum substrates; super polish nickel plated aluminum substrates
Application signed: September 22, 1999
Ruling Forwarded to PD of Customs: San Francisco, March 22, 2000
Effect on other rulings: None
Ruling: 44–05909–000

(P) Company: Monsanto Co.
Articles: Duralink HTS (Hexamethylene-1,6-bis(thiosulphate), disodium salt, dihydrate)
Merchandise: 1,6-dichlorohexane (a/k/a DCH and 6-DCH)
Application signed: October 20, 1999
Ruling Forwarded to PD of Customs: Boston, April 7, 2000
Effect on other rulings: None
Ruling: 44–05918–000

(Q) Company: Norton Performance Plastics Corp.
Articles: Not modified
Merchandise: Not modified
Supplemental Application signed: January 15, 1999
Modification approved by PD of Customs in accordance with §191.8(g)(2): New York, March 14, 1999
Effect on other rulings: Modifies T.D. 91–92–T; 44–02975–000 to cover change in company name from Norton Chemplast, Inc.
Ruling: 44–02975–001

(R) Company: Pasco Beverage Co.
Articles: Not modified
Merchandise: Not modified
Supplemental Application signed: December 29, 1999
Modification approved by PD of Customs in accordance with §191.8(g)(2): Miami, January 13, 2000
Effect on other rulings: Modifies T.D. 91–92–Q; 44–04592–000 to cover change in company name from Lykes Pasco, Inc.
Ruling: 44–04592–001

(S) Company: Pasco Beverage Co.
Articles: Not modified
Merchandise: Not modified
Supplemental Application signed: December 29, 1999
Modification approved by PD of Customs in accordance with §191.8(g)(2): Miami, January 13, 2000
Effect on other rulings: Modifies T.D. 99–47–L; 44–04074–001 to cover change in company name from Lykes Pasco, Inc.
Ruling: 44–04074–002

(T) Company: Regal Manufacturing Co.
Articles: Yarns (textured, conventionally covered, air covered and plied)
Merchandise: Partially oriented nylon, spandex, rubber and cotton yarns
Supplemental Application signed: January 11, 2000
Ruling Forwarded to PD of Customs: San Francisco, April 14, 2000
Effect on other rulings: None
Ruling: 44–05931–000

(U) Company: Rhône-Poulenc Ag Company Inc.
Articles: Not modified
Merchandise: Not modified
Supplemental Application signed: October 27, 1998
Modification approved by PD of Customs in accordance with §191.8(g)(2): New York, February 4, 1999
Effect on other rulings: Modifies T.D. 96–26–S; 44–03735–001 to cover change in company name from Rhône-Poulenc, Inc.
Ruling: 44–03735–002

(V) Company: Rhône-Poulenc Ag Company Inc.
Articles: Not modified
Merchandise: Not modified
Supplemental Application signed: October 27, 1998
Modification approved by PD of Customs in accordance with §191.8(g)(2): New York, February 4, 1999
Effect on other rulings: Modifies T.D. 94–82–Q; 44–03911–000 to cover change in company name from Rhône-Poulenc, Inc.
Ruling: 44–03911–001

(W) Company: Rhône-Poulenc Ag Company Inc.
Articles: Not modified
Merchandise: Not modified
Supplemental Application signed: October 27, 1998
Modification approved by PD of Customs in accordance with §191.8(g)(2): New York, February 4, 1999
Effect on other rulings: Modifies T.D. 97–12–W; 44–04915–000 to cover change in company name from Rhône-Poulenc, Inc.
Ruling: 44–04915–001

(X) Company: Rhône-Poulenc Ag Company Inc.
Articles: Not modified
Merchandise: Not modified
Supplemental Application signed: October 27, 1998
Modification approved by PD of Customs in accordance with §191.8(g)(2): New York, February 4, 1999
Effect on other rulings: Modifies T.D. 97–92–W; 44–05213–000 to cover change in company name from Rhône-Poulenc, Inc.
Ruling: 44–05213–001

(Y) Company: Solutia Inc.
Articles: Duralink HTS (Hexamethylene-1,6-bis(thiosulphate), disodium salt, dihydrate)
Merchandise: 1,6-dichlorohexane (a/k/a DCH and 6-DCH)
Application signed: October 15, 1999
Ruling Forwarded to PD of Customs: Boston, April 7, 2000
Effect on other rulings: None
Ruling: 44–05919–000

(Z) Company: Velsicol Chemical Corp.
Articles: Benzoflex plasticizers
Merchandise: Benzoic acid
Application signed: August 24, 1999
Ruling Forwarded to PD of Customs: Boston, March 17, 2000
Effect on other rulings: None
Ruling: 44–05906–000

U.S. Customs Service

General Notices

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, June 21, 2000.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

STUART P. SEIDEL,
Assistant Commissioner,
Office of Regulations and Rulings.

PROPOSED REVOCATION OF RULING LETTERS AND TREATMENT RELATING TO CLASSIFICATION OF GAS ENGINE POWERED PNEUMATIC DRILLS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of classification ruling letter and treatment relating to the classification of gas engine powered pneumatic drills.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling letter pertaining to the tariff classification of gas engine powered pneumatic drills and any treatment previously accorded by the Customs Service to substantially identical transactions. Comments are invited on the correctness of the intended action.

DATE: Comments must be received on or before August 4, 2000.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings,

Attention: General Classification Branch, 1300 Pennsylvania Avenue. N.W., Washington, D.C. 20229. Comments submitted may be inspected at the same location during regular business hours.

FOR FURTHER INFORMATION CONTACT: Benjamin J. Bornstein, General Classification Branch, (202) 927–2388.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility.**" These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended, (19 U.S.C. §1484) the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that Customs intends to revoke a ruling letter pertaining to the tariff classification of gas engine powered pneumatic drills. Although in this notice Customs is specifically referring to one ruling, New York Ruling Letter (*NY*) *E87021*, dated September 14, 1999, this notice covers any rulings on this merchandise which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing data bases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should advise the Customs Service during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs intends to revoke any treatment previously accorded by the Customs Service to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to im-

portations of the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States (HTSUS). Any person involved in substantially identical transactions should advise Customs during this notice period. An importer's failure to advise the Customs Service of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to this notice.

In *NY E87021*, dated September 14, 1999, Customs ruled that a gas engine powered pneumatic drill was classifiable under subheading 8508.10.00, HTSUS, as an electromechanical tool for working in the hand, with self-contained electric motor and rotary drill capacity. *NY E87021* is set forth in "Attachment A" to this notice. Since the issuance of that ruling, Customs has had a chance to review the classification of this merchandise and has determined that the classification is in error. It is now Customs position that the subject merchandise is classifiable in subheading 8467.89.50, HTSUS, as a gas engine powered pneumatic drill.

Pursuant to 19 U.S.C. 1625(c)(1), Customs intends to revoke *NY E87021*, and any other ruling not specifically identified, to reflect the proper classification of the merchandise pursuant to the analysis set forth in Proposed Headquarters Ruling Letter (*HQ*) 963673 (*see* "Attachment B" to this document). Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment previously accorded by the Customs Service to substantially identical transactions. Before taking this action, consideration will be given to any written comments timely received.

Dated: June 19, 2000.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, September 14, 1999.
CLA–2–85:RR:NC:1:115 E87021
Category: Classification
Tariff No. 8508.10.0070

MR. ROBERT C WATSON III
LO INK SPECIALTIES
PO Box 220
Freeport ME 04032–0220

Re: The tariff classification of Hammer Drill from Canada.

DEAR MR. WATSON:

In your letter dated September 3, 1999 you requested a tariff classification ruling.

The item is a pneumatic powered hammer drill.

The applicable subheading for the Hammer Drill will be 8508.10.0070, Harmonized Tariff Schedule of the United States (HTS), which provides for Electromechanical tools for working in the hand with self-contained electric motor; parts thereof: Drills of all kinds * * * Other, including hammer drills. The rate of duty will be 1.7% ad valorem.

There are no restrictions for this item.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Melvyn Birnbaum at 212–637–7017.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.
CLA–2 RR:CR:GC 963673 BJB
Category: Classification
Tariff No. 8467.89.50

MR. ROBERT C. WATSON, III
LO INK SPECIALTIES
P.O. Box 220
Freeport, ME 0432–0220

Re: Hand-held pneumatic, gas-powered hammer drill; Revocation of NY E87021.

DEAR MR. WATSON:

In response to your letter of September 3, 1999, the Director of Customs National Commodity Specialist Division, New York, issued you NY E87021 on September 14, 1999, regarding the classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of a "pneumatic powered hammer drill." Your letter and documentation were forwarded to this office for reconsideration of the ruling.

We have reviewed NY E87021, and have determined that the classification set forth is in error. This ruling revokes NY E87021. We regret the delay in responding.

Facts:

The merchandise consists of a rotary hammer drill ("pneumatic drill"), that incorporates a compressed air motor powered by a gas engine. The literature you provided, de-

scribes a "Model ER–382K G.P. 1½" Rotary Hammer." The pneumatic drill uses heavy-duty spline bits and accepts chipper, chisel and bull point hammer bits. The article has a D-type handle, safety clutch and free flight percussion hammer to absorb vibration and recoil. An auxiliary handle, depth gauge stop and steel carrying case are included. The pneumatic drill does not have an electric motor. The specifications you have provided describe the drive system as a pneumatic powered hammer mechanism and the engine type as an "air cooled, 2 cycle gasoline."

The pneumatic drill head is powered by a "free floating piston, which rotates the bit." You have stated that the pneumatic drill, "is used to drill holes in rock, asphalt and concrete," to "chip and break pavement" and to "pound rebar into the ground."

In NY E87021, the pneumatic drill was determined to be classifiable under subheading 8508.10.00, HTSUS, which provides for "[e]lectromechanical tools for working in the hand, with self-contained electric motor; parts thereof: Drills of all kinds * * * Rotary:"

Issue:

Whether the pneumatic drill, is classifiable under subheading 8508.10.00, HTSUS, as an electro-pneumatic rotary and percussion hammer, under subheading 8467.11.50, HTSUS, as a hand-held tool, pneumatic, hydraulic or with self-contained nonelectric motor, and parts thereof, or under subheading 8467.89.50, HTSUS, as a hand-held tool, pneumatic, hydraulic or with self-contained nonelectric motor, and parts thereof * * * "Other. Other."

Law and Analysis:

Classification of merchandise under the HTSUS is in accordance with the General Rules of Interpretation (GRIs). Under General Rule of Interpretation (GRI) 1, HTSUS, goods are to be classified according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6.

In understanding the language of the HTSUS, the Harmonized Commodity Description and Coding System Explanatory Notes may be utilized. The Explanatory Notes (ENs), although not dispositive or legally binding, provide a commentary on the scope of each heading of the HTSUS, and are generally indicative of the proper interpretation of these headings. Customs believes the ENs should always be consulted. *See* T.D. 98–80, 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

The HTSUS headings under consideration are as follows:

8467	Tools for working in the hand, pneumatic, hydraulic or with self-contained nonelectric motor, and parts thereof:
	Pneumatic:
8467.11	Rotary type (including combined rotary-percussion):
8467.11.10	Suitable for metal working
8467.11.50	Other
* * * * * * *	
	Other tools:
8467.89	Other:
8467.89.10	Suitable for metal working
8467.89.50	Other
* * * * * * *	
8508	Electromechanical tools for working in the hand, with self-contained electric motor; parts thereof
* * * * * * *	
8508.10.00	Drills of all kinds
* * * * * * *	

Heading 8508, HTSUS, provides for "[e]lectromechanical tools for working in the hand, with self-contained electric motor; parts thereof[.]" The subject article is a hand-held tool. It is specifically designed with a gas engine. It uses compressed air to operate. It is not an electromechanical tool. It does not have a self-contained electric motor. The pneumatic drill is not classifiable under heading 8508, HTSUS, because it does not meet the terms provided therein.

The specifications you have provided demonstrate that the article is, in fact, a pneumatic hammer drill powered by an air-cooled, 2-cycle gasoline engine. Heading 8467, HTSUS,

provides for "[t]ools for working in the hand, pneumatic, hydraulic or with self-contained nonelectric motor, and parts thereof: Pneumatic[.]" The pneumatic drill is classifiable according to the terms of this heading.

EN 84.67, page 1394, states in pertinent part:

> "This heading covers tools which incorporate a compressed air motor (or compressed air operated piston), an internal combustion motor or any other non-electric motor. * * *"

The pneumatic drill has no external source of compressed air. The "compressed air motor" is actually a cylinder with a piston inside it. Power is supplied to the cylinder and piston by a gas engine through a gear. When power is supplied, air in the cylinder is pressurized. This pressurization forces the piston forward to apply force activating whatever tool is being used. Compressed air is evacuated by valves permitting repetition of the process and causing the piston to move back and forth. This rapid back-and-forth movement causes a drill to rotate or a hammer to deliver blows.

Under heading 8467, HTSUS, we note that the subject article is *prima facie* classifiable under two subheadings: 8467.11.50 and 8467.89.50, HTSUS. Comparing the terms of these two subheadings, we find however, that each subheading describes part only of the components in this tool. Subheading 8467.11.50, HTSUS, describes the subject article's pneumatic feature, while subheading 8467.89.50, HTSUS, *prima facie* provides for only the gas engine feature.

GRI 6 states in part, that for legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and, by appropriate substitution of terms, to GRIs 1 through 5, on the understanding that only subheadings at the same level are comparable.

GRI 3(b) states that when goods are, *prima facie*, classifiable under two or more headings, classification shall be effected as follows: "[m]ixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to GRI 3(a), shall be classified as if they consisted of the material or component which gives them their **essential character** * * *" [emphasis added].

In defining "essential character" for purposes of GRI 3(b), the Court of International Trade has looked to the role of the constituent parts and materials in relation to the use of the good, and found that the component that performs the "indispensable function" of the article, imparts the "essential character" of the good. *Mita Copystar America, Inc., v. United States*, 966 F. Supp. 1254 (CIT 1997), motion for rehearing and reconsideration denied, 994 F. Supp. 393 (CIT 1998), and *Vista International Packaging Co., v. United States*, 19 CIT 868, 890 F. Supp. 1095 (1995).

In the instant case, the pneumatic component of the subject article is essential to its operation. However, absent the article's gas engine the pneumatic component will not function. Thus, while each subheading, 8467.11.50 and 8467.89.50, describes an essential component of the article, neither includes both. Both the pneumatic component and the gas engine are indispensible to the drill's ability to function. Where the "essential character" of the subject article cannot be determined from the terms provided under two competing subheadings by reference to GRI 3(a) or GRI 3(b), GRI 3(c) should be applied at GRI 6. Thus, at GRI 3(c), the pneumatic drill is classifiable under the "[sub]heading which occurs last in numerical order among those which equally merit consideration." The pneumatic drill is, therefore, classifiable under subheading 8467.89.50, HTSUS.

Holding:

The pneumatic drill, is not provided for under subheading 8508.10.00, HTSUS, as an "[e]lectromechanical tool for working in the hand, with self-contained electric motor; parts thereof: Drills of all kinds * * * Other, including hammer drills." The pneumatic drill is classifiable under subheading 8467.89.50, HTSUS, which provides for "[t]ools for working in the hand, pneumatic, hydraulic or with self-contained nonelectric motor, and parts thereof: Pneumatic: Rotary type (including combined rotary-percussion): Other * * * Other * * * Other."

Effect on Other Rulings:

NY E87021, dated September 14, 1999, is **revoked** as set forth herein.

JOHN DURANT,
Director,
Commercial Rulings Division.

PROPOSED MODIFICATION OF RULING LETTER AND REVOCATION OF TREATMENT RELATING TO CLASSIFICATION OF BUBBLE BATH

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification of classification ruling letter and revocation of treatment relating to the classification of bubble bath.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling letter pertaining to the tariff classification of bubble bath and revoke any treatment previously accorded by the Customs Service to substantially identical transactions. Comments are invited on the correctness of the intended action.

DATE: Comments must be received on or before August 4, 2000.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: General Classification Branch, 1300 Pennsylvania Avenue. N.W., Washington, D.C. 20229. Comments submitted may be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, 1300 Pennsylvania Avenue, N.W., Washington D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Peter T. Lynch, General Classification Branch, 202–927–1396.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility**." These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended, (19 U.S.C. §1484) the importer of record is responsible for using reasonable care to enter, classify and value imported

merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that Customs intends to modify a ruling letter pertaining to the tariff classification of bubble bath. Although in this notice Customs is specifically referring to one ruling, New York Ruling Letter (NY) C89743, this notice covers any rulings on this merchandise which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing data bases for rulings in addition to the one identified. No further rulings have been found. This notice will cover any rulings on this merchandise which may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should advise the Customs Service during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs intends to revoke any treatment previously accorded by the Customs Service to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States (HTSUS). Any person involved in substantially identical transactions should advise Customs during this notice period. An importer's failure to advise the Customs Service of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or their agents for importations of merchandise subsequent to this notice.

In NY C89743, dated August 7, 1998, the classification of a product commonly referred to as Bubble Bath was determined to be in subheading 3402.20.5000 HTSUS. This ruling letter is set forth in "Attachment A" to this document. Since the issuance of that ruling, Customs has had a chance to review the classification of this merchandise and has determined that the classification is in error. The correct classification of the bubble bath is in subheading 3307.30.5000, HTSUS, under the provision for cosmetic or toilet preparations * * * perfumed bath salts and other bath preparations.

Customs, pursuant to 19 U.S.C. 1625(c)(1), intends to modify NY C89743, and any other ruling not specifically identified to reflect the proper classification of the merchandise pursuant to the analysis set forth in Proposed Headquarters Ruling Letter (HQ) 963171 (*see* "Attachment B" to this document). Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment previously ac-

corded by the Customs Service to substantially identical transactions. Before taking this action, consideration will be given to any written comments timely received.

Dated: June 19, 2000.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, August 7, 1998.
CLA–2–34:RR:NC:2:236 C89743
Category: Classification
Tariff No. 3402.20.5000 and 9503.49.0025

MS. HELEN NEWELL
POLARDREAMS INTERNATIONAL LTD.
602 W. Burlington
Fairfield, IA 52556

Re: The tariff classification of "Kleanie Pals", the Super Klean Kids Collection from China.

DEAR MS. NEWELL:

In your letter dated June 30, 1998, you requested a tariff classification ruling.

The sample submitted consists of one stuffed dinosaur-like textile figure, measuring approximately seven inch high, and two pump bottles of bubble bath put up in retail packages (32 fl. oz.). All are import and put up for retail sale together in a single package.

The figure is made of terry cloth and is stuffed primarily with bean fill. It has the general appearance and feel of a stimulating toy for young children. When not in use as a wash mitt, the stuffed figure will continue to provide play, amusement and entertainment for a child. Therefore, use as a toy plaything is its principle use. The bubble bath is a formulated non-aromatic surface-active liquid, which may be imported in various fruit fragrances (i.e. grape, strawberry).

For Customs purpose, the "Kleanie Pal" is not a set as imported and will be classified separately.

The applicable subheading for Kleanie Pals Bubble Bath will be 3402.20.5000, Harmonized Tariff Schedule of the United States (HTS), which provides for Organic surface-active agents (other than soap); surface-active preparations, washing preparations) and cleaning preparations, whether or not containing soap, other than those of heading 3401: Preparations put up for retail sale: Other. The rate of duty will be Free.

The applicable subheading for the stuffed textile figure will be 9503.49.0025, HTS, which provides for Other toys; reduced-size ("scale") models and similar recreational models, working or not; puzzles of all kinds; parts and accessories thereof: Toys representing animals or non-human creatures (for example, robots and monsters) and parts and accessories thereof: Other: Toys. The rate of duty will be Free.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist V. Gualario at 212–466–5744.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:GC963171ptl
Category: Classification
Tariff No. 3307.30.5000

MS. HELEN NEWELL
POLARDREAMS INTERNATIONAL LTD.
602 W. Burlington
Fairfield, IA 52556

Re: "Kleanie Pals" Bubble Bath; Modification of NY C89743.

DEAR MS. NEWELL:

In NY C89743, which the Director of Customs National Commodity Specialist Division, in New York, issued to you on August 7, 1998, the bubble bath component of a child's bath product was classified in subheading 3402.20.5000, Harmonized Tariff Schedule of the United States, HTSUS, which provides for organic surface-active agents (other than soap); surface-active preparations, washing preparations and cleaning preparations, whether or not containing soap, other than those of heading 3401. We have reconsidered that ruling and determined that that portion is incorrect. The correct classification for that merchandise is in subheading 3307.30.5000, HTSUS, pursuant to the analysis set forth below.

Facts:

The "Kleanie Pals" classified in NY C89743 consists of one stuffed dinosaur-like textile figure, measuring approximately seven inches high, and two pump bottles of bubble bath put up in retail packages (32 fl. oz.). All the articles will be put up for sale together in a single package.

In analyzing the merchandise, NY C89743 first determined that the "Kleanie Pal" was not a set for Customs classification purposes and that the components should be classified separately. The terry cloth dinosaur-like figure, stuffed primarily with bean fill, was determined to be a stuffed toy and was classified in subheading 9503.49.0025, HTSUS.

The "Kleanie Pals" bubble bath, containing water, sodium laureth sulfate, lauramide DEA, sodium lauryl sulfoacetate, tea-peg-3 cocamide sulfate, disodium cocamido mea-sulfosuccinate, sodium chloride, fragrance, oleamide DEA, citric acid, methylchloroisothiazolinone, (and) methylisthiazolinone, was classified in subheading 3402.20.5000, Harmonized Tariff Schedule of the United States, HTSUS, which provides for organic surface-active agents (other than soap); surface-active preparations, washing preparations and cleaning preparations, whether or not containing soap, other than those of heading 3401.

Customs does not see any reason to modify NY C89743 regarding whether the article constitutes a "set" for classification proposes, or the classification of the stuffed toy.

Issue:

What is the classification of "Kleanie Pals" bubble bath?

Law and Analysis:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). The systematic detail of the HTSUS is such that virtually all goods are classified by application of GRI 1, that is, according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied in order.

The HTSUS headings under consideration are as follows:

3307	Pre-shave, shaving or after-shave preparations, personal deodorants, bath preparations, depilatories and other perfumery, cosmetic or toilet preparations, not elsewhere specified or included; prepared room deodorizers, whether or not perfumed or having disinfectant properties:

* * * * * * *

3307.30	Perfumed bath salts and other bath preparations:
3307.30.1000	Bath salts, whether or not perfumed
3307.30.5000	Other
3402	Organic surface-active agents (other than soap); surface-active preparations, washing preparations (including auxiliary washing preparations) and cleaning preparations, whether or not containing soap, other than those of heading 3401:
	Organic surface-active agents, whether or not put up for retail sale:
3402.20	Preparations put up for retail sale:
3402.20.1000	Containing any aromatic or modified aromatic surface-active agent
3402.20.5000	Other

The Chapter Notes to Chapter 34, HTSUS, state: "1. This chapter does not cover: * * * (c) Shampoos, dentifrices, shaving creams and foams or bath preparations, containing soap or other organic surface-active agents (heading 3305, 3306 or 3307)." Because the "Kleanie Pals" bubble bath is a bath preparation containing organic surface-active agents, it is excluded by this note from classification in heading 3402.

In understanding the language of the HTSUS, the Harmonized Commodity Description and Coding System Explanatory Notes may be utilized. The Explanatory Notes (ENs), although not dispositive or legally binding, provide a commentary on the scope of each heading of the HTSUS, and are generally indicative of the proper interpretation of these headings. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

EN 33.07 (III) provides: This heading covers: "Bath preparations, such as perfumed bath salts and preparations for foam baths, whether or not containing soap or other organic surface-active agents (see Note 1(c) to Chapter 34)."

The Chapter Note and the EN, when read together, clearly indicate that the proper classification for the "Kleanie Pals" bubble bath preparation is in heading 3307.

Holding:

"Kleanie Pals" bubble bath preparation is classified in subheading 3307.30.5000, HTSUS, which provides for: Pre-shave, shaving or after-shave preparations, personal deodorants, bath preparations, depilatories and other perfumery, cosmetic or toilet preparations, not elsewhere specified or included; prepared room deodorizers, whether or not perfumed or having disinfectant properties: [p]erfumed bath salts and other bath preparations: [b]ath salts, whether or not perfumed; [o]ther.

NY C98743, dated August 7, 1998, is modified in accordance with this ruling.

JOHN DURANT,
Director,
Commercial Rulings Division.

MODIFICATION OF CUSTOMS RULING LETTER AND REVOCATION OF TREATMENT RELATING TO TARIFF CLASSIFICATION OF JEWELRY ROLLS

AGENCY: U.S. Customs Service, Department of Treasury.

ACTION: Notice of modification of a tariff classification ruling letter and revocation of treatment relating to the classification of jewelry rolls.

SUMMARY: Pursuant to Section 625(c), Tariff Act of 1930, as amended, (19 U.S.C. 1625(c)), this notice advises interested parties that Customs is modifying a ruling letter pertaining to the tariff classification of two jewelry rolls and revoking any treatment previously accorded by Customs to substantially identical merchandise. Notice of the proposed modification was published in the CUSTOMS BULLETIN of May 17, 2000, Vol. 34, No. 20. No comments were received.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after September 5, 2000.

FOR FURTHER INFORMATION CONTACT: Mary Beth Goodman, Textile Branch, (202) 927–1368.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility.**" These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended, (19 U.S.C. § 1484) the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

In Port Decision (PD) C89581, dated July 29, 1998, concerning the tariff classification of jewelry rolls of textile material with an outer surface of vinyl, the products were erroneously classified under subheading 4202.92.45 of the Harmonized Tariff Schedule of the United States

(HTSUS), which provides for travel, sports and similar bags with an outer surface of sheeting of plastic. The correct classification for the product should be under subheading 4202.92.90 of the HTSUS, as other specially shaped or fitted containers.

Customs, pursuant to 19 U.S.C. 1625(c)(1), is modifying PD C89581, and any other ruling not specifically identified on identical or substantially similar merchandise to reflect the proper classification within the HTSUS pursuant to the analysis set forth in Headquarter Ruling (HQ) 962245 (*see* "Attachment" to this document). Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment previously accorded by Customs to substantially identical merchandise.

As stated in the proposed notice, this modification will cover any rulings on this issue which may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the issue subject to this notice, should have advised Customs during the notice period. Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(2)), Customs is revoking any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, have been the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations involving the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States. Any person involved in substantially identical transactions should have advised Customs during the notice period. An importer's reliance on a treatment of substantially identical transactions or on a specific ruling concerning the merchandise covered by this notice which was not identified in this notice may raise the rebuttable presumption of lack of reasonable care on the part of the importer or its agents for importations subsequent to the effective date of this final decision.

Dated: June 20, 2000.

JOHN E. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, June 20, 2000.

CLA–2 RR:CR:TE MBG
Category: Classification
Tariff No. 4202.92.90

MR. PETER D. ALBERDI
A.J. ARANGO, INC.
1516 East 8th Avenue
Tampa, FL 33605

Re: Modification of PD C89581; Classification of Jewelry Rolls.

DEAR MR. ALBERDI:

On July 29, 1998, Customs issued Port Decision (PD) C89581 to your company on behalf of Bufkor, Inc., regarding the tariff classification of two jewelry rolls with outer surfaces of vinyl. The jewelry rolls were originally classified under subheading 4202.92.4500 of the Harmonized Tariff Schedule of the United States Annotated ("HTSUSA"). Upon review, Customs has determined that the jewelry rolls were erroneously classified under 4202.92.4500, HTSUSA. The correct classification for the merchandise should be under subheading 4202.92.90, HTSUSA based on the classification as a jewelry roll "with an outer surface of sheeting of plastic or of textile materials," however, Customs is unable to determine the essential characteristic of the jewelry rolls to provide classification at the ten digit level without samples of the subject merchandise.

Pursuant to section 625(c), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)), notice of the proposed modification of PD C89581 was published on May 17, 2000, in the CUSTOMS BULLETIN, Volume 34, Number 20. No comments were received.

Facts:

The first item under reconsideration is a jewelry roll with an outer surface of vinyl. The item is designed to contain jewelry or other personal items. The item measures approximately 3½ inches in length by 6½ inches in width. The item has metal tips on each corner with a logo "Porcell Jewelers Portland" located at the lower right-hand side. When opened, the sample is lined in man-made textile materials with two zippered compartments. A 6½ inch strip is intended to hold seven sets of earrings. In addition, there is a padded strap which holds rings or longer items. The jewelry roll when folded is secured with a snap closure.

The second item under reconsideration is described as a small jewelry roll with an outer surface of vinyl. The item is designed to contain jewelry or other personal items. When folded, the item measures approximately 2½ inches in length by 4½ inches in width. At the center of the sample is printed "ORBIS." The sample is lined in man-made textile materials. There is one zippered compartment, a strap to hold five sets of earrings, and a strap to hold rings or to hang other personal items. When folded, the jewelry roll is secured by a snap closure.

Issue:

What is the proper classification of the jewelry rolls under the HTSUSA?

Law and Analysis:

Classification of goods under the HTSUSA is governed by the General Rules of Interpretation ("GRIs"). GRI 1 provides that classification shall be determined according to the terms of the heading of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied. The Explanatory Notes ("EN") to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRI.

Heading 4202, HTSUSA provides for "Trunks, Suit-Cases, Vanity-Cases, Executive-Cases, Briefcases, School Satchels, Spectacle Cases, Binocular Cases, Camera Cases, Musical Instrument Cases, Gun Cases, Holsters and Similar Containers; Travelling-Bags,

Toilet Bags, Rucksacks, Handbags, Shopping-Bags, Wallets, Purses, Map-Cases, Cigarette-Cases, Tobacco-Pouches, Tool Bags, Sports Bags, Bottle-Cases, **Jewelry Boxes**, Powder-Boxes, Cutlery Cases **and Similar Containers**, of Leather or of Composition Leather, of Sheeting of Plastics, of Textile Materials, of Vulcanised Fibre or of Paperboard, or Wholly or Mainly Covered with Such Materials or With Paper." (Emphasis added).

Thus, this heading encompasses the articles enumerated, as well as containers similar to these articles.

The Explanatory Notes (EN) to the Harmonized Commodity Description and Coding System constitute the official interpretation of the nomenclature at the international level. While not legally binding, they do represent the considered views of classification experts of the Harmonized System Committee. It has therefore been the practice of the Customs Service to follow, whenever possible, the terms of the EN when interpreting the HTSUSA.

The EN to heading 4202, HTSUSA, state, in pertinent part:

> The articles covered by the second part of the heading must, however, be only of the materials specified therein or must be wholly or mainly covered with such materials or with paper (the foundation may be of wood, metal, etc.). The expression "similar containers" in this second part includes note-cases, writing-cases, pen-cases, ticket-cases, needle-cases, key-cases, cigar-cases, pipe-cases, tool and **jewellery** [sic] **rolls**, shoe-cases, brush-cases, etc.

(Emphasis added.)

When these products were originally reviewed by Customs, an error occurred in the classification at the subheading level. Merchandise classified in subheading 4202.92.4500, HTSUSA, are generic bags of a class or kind designed to contain personal effects or property such as toiletries, articles of jewelry, or other accessories; however, such containers and bags are not specifically shaped. The articles under reconsideration are specially shaped or fitted containers designed to contain a specific article of jewelry or set of jewelry articles and, therefore, the jewelry rolls are provided for in subheading 4202.92.90, HTSUSA. However, without a sample, Customs is unable to determine the essential character of the jewelry rolls and as such classification of the merchandise is based on the 8 digit level. Classification at the ten digit level will be completed upon the receipt of samples for the subject jewelry rolls.

Holding:

This ruling modifies PD C89581 and classifies the jewelry rolls under subheading 4202.92.90, HTSUSA, which provides for "other containers, other, with outer surface of plastic sheeting or of textile materials, other, other, other." In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

JOHN E. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

REVOCATION OF RULING LETTER AND TREATMENT RELATING TO CLASSIFICATION OF RUDOLPH AND SANTA CERAMIC CHIP AND DIP SET

AGENCY: U.S. Customs Service, Department of the Treasury

ACTION: Notice of revocation of tariff classification ruling letter and treatment relating to the classification of a Rudolph and Santa Ceramic Chip and Dip Set.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a ruling letter pertaining to the classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of a Rudolph and Santa Ceramic Chip and Dip Set and any treatment previously accorded by the Customs Service to substantially identical transactions.

DATE: Merchandise entered or withdrawn from warehouse for consumption on or after September 5, 2000.

FOR FURTHER INFORMATION CONTACT: John G. Black, General Classification Branch (202) 927–1317.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility**." These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended, (19 U.S.C. §1484) the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, a notice was pub-

lished on May 10, 2000, in the CUSTOMS BULLETIN, Volume 34, Number 19, proposing to revoke New York Ruling Letter (NY) D84481 dated November 27, 1998, pertaining to the tariff classification of a Rudolph and Santa Ceramic Chip and Dip Set. No comments were received in response to this notice.

As stated in the proposed notice, this revocation will cover any rulings on this merchandise which may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should have advised Customs during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs is revoking any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States (HTSUS). Any person involved in substantially identical transactions should have advised Customs during this notice period. An importer's failure to advise Customs of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or his agents for importations of merchandise subsequent to this notice.

In NY D84481, issued November 27, 1998, Customs ruled that a Rudolph and Santa Chip and Dip Set was classified in subheading 6912.00.4810, HTSUS, which provides for "Ceramic tableware, kitchenware, other household articles and toilet articles, other than of porcelain or china: Tableware and kitchenware: Other: Other: Other: Other, Suitable for food or drink contact." Since the issuance of that ruling, Customs has had a chance to reconsider the classification of this merchandise based on the information as to use provided by the importer and from other sources and has determined that the 1998 ruling was in error. We have determined that this Rudolph and Santa Chip and Dip Set is within the class of other festive articles and is properly classified in subheading 9505.10.5060, HTSUS, as "Festive, carnival or other entertainment articles, including magic tricks and practical joke articles; parts and accessories thereof: Articles for Christmas festivities and parts and accessories thereof: Other: Other: Other."

Pursuant to 19 U.S.C. 1625(c)(1), Customs is revoking NY D84481 and any other ruling not specifically identified, to reflect the proper classification of the Merchandise. Headquarters Ruling Letter (HQ) 962536 is set forth as an attachment to this document. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment previously accorded by the Customs Service to substantially identical transactions.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN.

Dated: June 20, 2000.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
Washington, DC, June 20, 2000.

CLA–2 RR:CR:GC 962536 JGB
Category: Classification
Tariff No. 9505.10.5020

MR. DAVID M. MURPHY
GRUNFELD, DESIDERIO, LEBOWITZ & SILVERMAN LLP
245 Park Ave.
New York, NY 10167–3397

Re: Revocation of NY D84481; Rudolph and Santa Ceramic Chip and Dip Set; *Midwest of Cannon Falls, Inc. v. United States.*

DEAR MR. MURPHY:

This is in response to your letter of January 22, 1999, on behalf of Cardinal, Inc., which requests reconsideration of New York Ruling Letter (NY) D84481, issued to you on November 27, 1998, concerning the classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of a Rudolph and Santa Ceramic Chip and Dip Set.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, a notice was published on May 10, 2000 in the CUSTOMS BULLETIN, Volume 34, Number 19, proposing to revoke NY D84481, issued November 27, 1998. No comments were received in response to this notice.

This letter is to inform you that D84481 no longer reflects the view of the Customs Service concerning the classification of the Rudolph and Santa Ceramic Chip and Dip Set and that the following reflects our position for this product.

Facts:

The Rudolph and Santa Ceramic Chip and Dip Set (style # G5920) consists of the following:

- a ceramic serving chip dish, measuring approximately 14 inches in length by 3 inches at its highest point. Its exterior surface possesses a Christmas tree, reindeer and candy cane motif in relief with a reindeer-like figurine, measuring about 4¼ inches high, that is permanently affixed near the side of the dish.
- a ceramic sleigh-shaped dip dish, measuring about 5¼ inches long by 3 inches at its highest point, that is decorated with a motif of candy canes and holly leaves with berries. There is also a Santa figurine, measuring approximately 4¼ inches high, which is standing adjacent to the sleigh.

Information provided noted that the Rudolph and Santa Ceramic Chip and Dip Set is "marketed and sold through Christmas stores, general merchandise stores that carry seasonal articles, and is also sold through a 1998 holiday catalog."

Issue:

Whether the Rudolph and Santa Ceramic Chip and Dip Set is classified in heading 6912, HTSUS, as other ceramic tableware, or in heading 9505, HTSUS, as a festive article.

Law and Analysis:

Classification under the HTSUS is made in accordance with the General Rules of Interpretation (GRI). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied. The Explanatory Notes (EN) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUS by offering guidance in understanding the scope of the headings and GRI.

Heading 6912, HTSUS, provides for "Ceramic tableware, kitchenware, other household articles and toilet articles, other than of porcelain or china." Subheading 6912.00.4810, HTSUS, HTSUS, provides for "Tableware and Kitchenware: Other: Other: Other: Other, Suitable for food or drink contact."

Note 2(k) to Chapter 69, HTSUS, which covers heading 6912, provides that this chapter does not cover "Articles of chapter 95 * * *." Thus, if the subject goods are classifiable under heading 9505, then Note 2(k) to Chapter 69 will preclude classification under heading 6912 and necessitate classification under Chapter 95.

Heading 9505, HTSUS, provides, among other things, for festive, carnival or other entertainment articles. Articles for Christmas festivities are specifically provided for in subheading 9505.10, HTSUS.

In *Midwest of Cannon Falls, Inc. v. United States*, Slip Op. 96–19 (Ct. Int'l Trade, 1996), *aff'd in part, rev'd in part*, 122 F.3d 1423, Appeal Nos. 96–1271, 96–1279 (Fed. Cir. 1997) (hereinafter *Midwest*), the Court addressed the scope of heading 9505, HTSUS, specifically the class or kind of merchandise termed "festive articles," and provided new guidelines for classification of such goods in the heading. In general, merchandise is classifiable as a festive article in heading 9505, HTSUS, when the article, *as a whole*:

1. Is not predominately of precious or semiprecious stones, precious metal or metal clad with precious metal;
2. Functions primarily as a decoration or functional item used in celebration of, and for entertainment on, a holiday; and
3. Is associated with or used on a particular holiday.

Based upon a review of the articles subject to the *Midwest* decision, Customs is of the opinion that the Court has included within the scope of the class "festive articles," decorative household articles which are representations of an accepted symbol for a recognized holiday, and utilitarian/functional articles that are three-dimensional representations of an accepted symbol for a recognized holiday. See the Informed Compliance Publication on the Classification of Festive Articles published in the CUSTOMS BULLETIN, Volume 32, Numbers 2/3, dated January 21, 1998.

In addition to the criteria listed above, the Court considered the general criteria for classification set forth in *United States v. Carborundum Company*, 63 CCPA 98, C.A.D. 1172, 536 F.2d 373 (1976), cert. denied, 429 U.S. 979 (hereinafter *Carborundum*). Therefore, with respect to decorative and utilitarian articles related to holidays and symbols not specifically recognized in *Midwest* or in the CUSTOMS BULLETIN dated January 21, 1998, Customs will also consider the general criteria set forth in *Carborundum* to determine whether a particular good belongs to the class or kind known as "festive articles." Those criteria include the general physical characteristics of the article, the expectation of the ultimate purchaser, the channels of trade, the environment of sale (accompanying accessories, manner of advertisement and display), the use in the same manner as merchandise which defines the class, economic practicality of so using the import, and recognition in the trade of this use.

An initial issue here is whether the Rudolph and Santa Ceramic Chip and Dip Set constitutes a set for tariff classification purposes, as determined in NY D84481. That decision, in essence, indicated that the serving dish did not qualify as a festive article because it did not constitute a three-dimensional representation of an accepted symbol of the particular holiday; although the sleigh-shaped dip dish with the Santa figurine, as a recognized symbol of the Christmas holiday, did bring that component of the set into the class of festive articles. The ruling stated that "the set as a whole is not a three-dimensional representation of a festive motif, thereby precluding consideration of classification under subheading 9505.10.5020." That decision regarded both articles as a set put up for retail sale and deter-

mined that the non-festive component provided the essential character, thereby requiring a classification of the set as ceramic tableware.

We think that the better view of the articles (regardless of the designation provided by the importer) would be as a composite good. We understand that the sleigh/Santa dip dish fits into a slight depression on the chip plate, reinforcing the obvious conclusion that these are two components adapted one to the other which are mutually complementary, so that together they form a whole which would not normally be offered for sale in separate parts. The sleigh/Santa dip dish is identified as providing the essential character of the composite good. As such, it serves to mark or distinguish the good and determine its use. The sleigh/Santa component is three-dimensional, as well as being functional, and its use, to hold a dip, gives a reason to use the whole article and identifies the role of the component in relation to the use of the good. *See* General Rules of Interpretation 2, 3(a), 3(b); EN (IX) to Rule 3(b) (composite goods); and EN (VIII) to Rule 3(b) (essential character).

In considering the *Midwest* standards, the Rudolph and Santa Ceramic Chip and Dip Set is not predominately of precious or semiprecious stones, precious metal or metal clad with precious metal. The set does appear to be a functional item used in the celebration of a festive occasion.

With respect to the general criteria set forth in *Carborundum* and further considered by the Court, we note that in terms of general physical characteristics, this both decorative and functional article has been made into festive article by the incorporation of three-dimensional festive images and could no longer be simply identified as a serving set for dips and chips.

The ultimate purchaser would have the expectation of using the article in connection with the celebration of Christmas season. The environment of the sale is established. The use of the article in the same manner as merchandise which defines the class is satisfied in that the article will be used only in connection with Christmas celebrations.

Holding:

The Rudolph and Santa Ceramic Chip and Dip Set is classified in subheading 9505.10.5020, HTSUS, the provision for "Festive, carnival, or other entertainment articles, * * * parts and accessories thereof: Articles for Christmas festivities and parts and accessories thereof: Other: Other, Other."

NY D84481 is hereby revoked.

In accordance with 19 U.S.C.1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

WITHDRAWAL OF PROPOSED MODIFICATION AND REVOCATION OF CUSTOMS RULING LETTERS AND REVOCATION OF TREATMENT RELATING TO TARIFF CLASSIFICATION OF WOMEN'S SWIMWEAR

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of withdrawal of proposed modification and revocation of tariff classification ruling letter and treatment relating to classification of women's swimwear.

SUMMARY: This notice advises interested parties that Customs is withdrawing its proposal to modify one ruling letter and revoke one ruling letter pertaining to the tariff classification of women's swimwear. Notice of the proposed modification and revocation was published on May 10, 2000, in the CUSTOMS BULLETIN, pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057 (1993)).

EFFECTIVE DATE: July 5, 2000.

FOR FURTHER INFORMATION CONTACT: Shari Suzuki, Textile Classification Branch, U.S. Customs Service, 1300 Pennsylvania Ave. NW, Washington, DC 20229 (202) 927–2339.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057 (1993)), on May 10, 2000, Customs published a notice in the CUSTOMS BULLETIN, Volume 34, Number 19, proposing to modify Headquarters Rulings Letter (HQ) 952907, dated January 29, 1993, and revoke HQ 952584, dated December 8, 1992, which classified women's swimwear under heading 6112, Harmonized Tariff Schedule of the United States (HTSUS). At this time, Customs has determined that the classification issue warrants further review.

Therefore, this notice advises interested parties that Customs is withdrawing its proposal to modify and revoke the rulings set forth above.

The merchandise subject to the rulings will thus continue to be classified in subheading, 6112.41.0010, HTSUS, and HQ 952907 and HQ 952584 remain in full force and effect.

Dated: June 14, 2000.

JOHN E. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

SOLICITATION OF APPLICATIONS FOR MEMBERSHIP ON CUSTOMS COBRA FEES ADVISORY COMMITTEE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: This document sets forth amended criteria for membership on the Customs COBRA Fees Advisory Committee and requests that new applications be submitted for membership on the committee. The amended criteria limit membership on the Committee to one U.S. Customs representative and up to eight parties that are directly subject to the payment of COBRA user fees. Also, the amended criteria make clear that a party is ineligible to serve on the Committee if the party serves on another advisory committee chartered by the Department of the Treasury, including any separate bureau, service or other office within the Department of the Treasury. Applications previously received for membership on the Committee will need to be resubmitted for consideration under this document.

DATES: New applications for membership will be accepted until July 24, 2000.

ADDRESSES: Applications should be addressed to Richard Coleman, Trade Compliance Team, U.S. Customs Service, 1300 Pennsylvania Avenue, NW., Room 5.2–A, Washington, D.C. 20229, Attention: COBRA 2000.

FOR FURTHER INFORMATION CONTACT: Richard Coleman, Trade Compliance Team, U.S. Customs Service, 202–927–0563.

SUPPLEMENTARY INFORMATION

BACKGROUND

By enactment of Pub. L. 106–36, the Miscellaneous Trade and Technical Corrections Act of 1999, section 13031 of the Consolidated Omnibus Budget Reconciliation Act (COBRA) of 1985 (19 U.S.C. 58c) was amended by adding language which directs the Commissioner of Customs to establish an advisory committee whose membership will consist of representatives from the airline, cruise ship and other transportation industries that may be subject to fees under section 13031.

The Committee, in accordance with the statute, will advise the Commissioner of Customs on issues related to the performance of inspectional services of the United States Customs Service. This advice will include, but not be limited to, issues such as the time periods during which inspectional services should be performed, the proper number and deployment of inspectional officers, the level of fees and the appropriateness of any proposed fee.

In accordance with the direction to create the advisory committee, Customs published a document in the Federal Register (65 FR 6254) on

February 8, 2000, establishing criteria and procedures for the selection of members on a Customs COBRA Fees Advisory Committee. Customs subsequently decided to amend these criteria principally to limit membership to applicants who are directly subject to COBRA user fees. Customs believes that these parties would be better-suited to serve on the committee. A revised charter for the committee will be duly filed. This document sets forth the amended criteria from that in the February 8, 2000, document and again solicits applications for this advisory committee.

STRUCTURE OF COMMITTEE

The Committee will consist of one U.S. Customs representative and up to eight industry members, selected to fairly balance the points of view to be represented and functions to be performed. The Deputy Commissioner of the U.S. Customs Service will be the Customs representative and will chair the Committee. The Deputy Commissioner may designate another official to serve in his absence as Acting Chairperson for purposes of presiding over a meeting of the Committee or performing any other duty of the chairperson. Two senior managers representing the Office of Finance and the Office of Field Operations of the U.S. Customs Service will serve as technical representatives to the chairperson. The Committee will be in existence unless, or until, such time as its establishment is repealed by Congress.

INDUSTRY MEMBERS SOUGHT

Industry members will be selected by the Commissioner of Customs from parties in various sectors of the transportation industry that directly pay COBRA user fees. The parties include operators of any of the following: railways, trucks, barges, commercial cargo vessels, commercial passenger vessels, general aviation, and passenger aircraft.

Whenever possible, the Commissioner will seek to select two members from among passenger aircraft operators and one member each from operators of railways, trucks, barges, commercial cargo vessels, commercial passenger vessels and general aviation. Additional passenger aircraft operators may be selected as members if the other sectors do not have a qualified applicant.

No person who is required to register under the Foreign Agents Registration Act or representative of a foreign principal may serve on the Advisory Committee.

It is noted that certain criteria set forth in the prior notice published soliciting applicants for the Customs COBRA Fees Advisory Committee have been amended. In particular, membership on the Committee is now restricted to parties who directly pay COBRA user fees. Thus, trade associations and similar transportation industry representatives are eliminated from possible membership on the Committee.

Also, the amended criteria make clear that a party who serves on another advisory committee is ineligible for membership on the Customs COBRA Fees Advisory Committee if the other advisory committee

is chartered by the Department of the Treasury, including any separate bureau, service or other office within the Department of the Treasury.

Applicants must demonstrate professional or personal qualifications relevant to the purpose, functions and tasks of the Committee. Appointments will be made with the objective of creating a diverse and balanced body with a variety of interests, backgrounds and viewpoints. Accordingly, because members will be selected based on their individual credentials and qualifications, membership on the Committee will be personal to the appointees; members will not be allowed to designate alternates to represent them at Committee meetings.

Members will not be paid compensation, nor will they be considered Federal employees for any reason. No per diem, transportation or other expenses will be reimbursed for the cost of attending meetings of the Committee, regardless of the location.

MEETINGS

Except when there are special meetings, no more than four meetings will be held during a two-year period, in accordance with the Federal Advisory Committee Act. Regular meetings will be held at six-month intervals. An occasional special meeting may be held at the discretion of the chairperson and the members.

Meetings are open to public observers, including the press, unless special procedures have been followed to close a meeting to the public. In the event of an unavoidable absence of a member at a meeting, even though an alternate may not represent a member, a representative of the member's organization may attend the session as a nonparticipating observer, even if the meeting is closed to the public.

Meetings will generally be held at the U.S. Customs Service Headquarters in Washington, D.C. On occasion, meetings may be held outside of Customs Headquarters, generally at a Customs port.

TERMS OF SERVICE

Initially, half the members (or as close to half as possible) will be appointed for a term of twelve months and the remainder of the members will be appointed for a term of twenty-four months. For example, should the Committee consist of seven industry members, three will be appointed for a term of twelve months and four will be appointed for a term of twenty-four months. Thereafter, members will serve for a period of twenty-four months. Members who served on the Committee during a prior term or terms are eligible to reapply for membership. However, it is expected that approximately half of the seats on the Committee will be filled with new members.

APPLICATIONS FOR MEMBERSHIP

Any interested person wishing to serve on the Customs COBRA Fees Advisory Committee must provide the following: a statement of interest and reasons for application together with a complete professional biography or resume. In addition, applicants must state in their applications that they agree to submit to pre-appointment security and

tax checks. There is no prescribed format for the application. Applicants may send a cover letter describing their interest and qualifications, along with a resume. Applications that were previously received for membership on the Committee will need to be resubmitted for consideration under this document.

Dated: June 16, 2000.

RAYMOND W. KELLY,
Commissioner of Customs.

[Published in the Federal Register, June 22, 2000 (65 FR 38884)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10278

Chief Judge

Gregory W. Carman

Judges

Jane A. Restani
Thomas J. Aquilino, Jr.
Richard W. Goldberg
Donald C. Pogue
Evan J. Wallach
Judith M. Barzilay
Delissa Anne Ridgway
Richard K. Eaton

Senior Judges

James L. Watson

Herbert N. Maletz

Nicholas Tsoucalas

R. Kenton Musgrave

Clerk

Leo M. Gordon

(Slip Op. 00–54)

SKF USA INC. AND SKF SVERIGE AB, PLAINTIFFS AND DEFENDANT-INTERVENORS *v.* UNITED STATES, DEFENDANT AND TORRINGTON CO., DEFENDANT-INTERVENOR AND PLAINTIFF

Consolidated Court No. 97–01–00054–S2

(Dated May 16, 2000)

JUDGMENT

TSOUCALAS, *Senior Judge:* This Court having received and reviewed the United States Department of Commerce, International Trade Administration's ("Commerce") *Final Results of Redetermination Pursuant to Court Remand* ("Remand Results"), *SKF USA Inc. v. United States,* 24 CIT ____, Slip Op. 00–2 (Jan. 5, 2000), and Commerce having complied with the Court's remand, and no responses to the Remand Results having been submitted by the parties, it is hereby

ORDERED that the Remand Results filed by Commerce on April 6, 2000, are affirmed in their entirety, and it is further

ORDERED that since all other issues have been previously decided, this case is dismissed.

(Slip Op. 00–55)

CITGO PETROLEUM CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 94–01–00023

[Judgment for plaintiff.]

(Dated May 18, 2000)

Dennis T. Snyder, P.A. (Dennis T. Snyder) for plaintiff.
David W. Ogden, Acting Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Lara Levinson* and *Jeffrey A. Belkin)*, *Richard McManus*, Office of the Chief Counsel, United States Customs Service, of counsel, for defendant.

OPINION

RESTANI, *Judge:* This matter challenging the imposition of the Harbor Maintenance Tax ("HMT") upon aircraft fuel withdrawn from a bonded warehouse for use in international flight is before the court on Cross Motions for Summary Judgment, pursuant to USCIT Rule 56. The court finds that the fuel cargo at issue is exempt from the tax.

FACTS

Plaintiff, Citgo Petroleum Corporation, is a domestic corporation that imports jet turbine fuel for sale to foreign and domestic airlines engaged in international traffic from, to and through airports in the United States. Pl.'s Statement of Undisputed Material Facts ¶ 1 (hereinafter "Pl.'s Statement"). Plaintiff imported jet turbine fuel into Port Everglades, Florida. *Id.* at ¶ 3. During the course of 1991, plaintiff discharged five cargoes of jet turbine fuel into a United States Customs Service bonded storage tank at that port. *Id.* at ¶¶ 2–3. At the time of unloading, plaintiff filed warehouse entries and paid the HMT upon those cargoes. *Id.* at ¶ 3.

Plaintiff subsequently withdrew the fuel and transported it to receiving aircraft. Pl.'s Statement ¶¶ 4 & 6. When technical requirements for duty-free treatment were met, plaintiff claimed entitlement to duty-free and tax-free treatment pursuant to 19 U.S.C. § 1309 (1994) for fuel for some receiving aircraft.[1] *Id.* at ¶ 6. For aircraft that Customs determined were not entitled to such exemption, plaintiff tendered duties and taxes to Customs. *Id.* at ¶ 9.

Customs subsequently liquidated the entries. Pl.'s Statement ¶ 11. After liquidation, plaintiff protested and requested refunds of the HMT, alleging that the fuel was exempt from the HMT pursuant to 19 U.S.C. § 1309. Pl.'s Mot. for Summ. J., Tab A, at 1. Customs denied the protest. *Id.* Plaintiff brings this action challenging the denial of its protest. Jurisdiction lies under 28 U.S.C. § 1581(a) (1994). *Amoco Oil Co. v. United States*, 63 F. Supp.2d 1332, 1334 (Ct. Int'l Trade 1999); *Thomson Con-*

[1] There appears to be no dispute as to the entitlement to § 1309 exemptions for the entries at issue. The only issue presented to the court is whether the HMT is within the exemption.

sumer Elecs., Inc. v. United States, 62 F. Supp.2d 1182, 1184 (Ct. Int'l Trade 1999).

The issue before the court is whether the HMT paid by a domestic corporation upon cargoes of jet fuel imported into bonded warehouses and later withdrawn as supplies for aircraft engaged in foreign trade are "internal revenue taxes" within the meaning of 19 U.S.C. § 1309(a). Section 1309 provides that supplies for "aircraft registered in the United States and actually engaged in foreign trade" may "be withdrawn * * * from any customs bonded warehouse * * * free of duty and internal-revenue tax." 19 U.S.C. § 1309(a)(1)(C).

DISCUSSION

First, it is clear that the HMT is a *tax*. Because the HMT is a tax, it was declared unconstitutional as to exports. *United States v. U.S. Shoe Corp.*, 523 U.S. 360, 362–63 (1998). The HMT is set forth in the Internal Revenue Code. *Id.* at 367. The court also found the HMT to be an internal revenue tax in *U.S. Shoe Corp. v. United States*, 20 CIT 206, 208 (1996). The court incorporated the *U.S. Shoe* opinion in *IBM Corp. v. United States*, No. 94–10–00625, 1998 WL 325156 (Ct. Int'l Trade June 17, 1998), *rev'd on other grounds*, 201 F.3d 1367 (Fed. Cir. 2000). In *IBM*, the appellate court accepted, at least for the purpose of argument, that the tax was an internal revenue tax. *IBM*, 201 F.3d at 1371. It stated a bit more, however.

> Because Congress codified the HMT as part of Title 26 of the United States Code, entitled "Internal Revenue Code," we may reasonably conclude that Congress considered the HMT to be an internal revenue tax. Furthermore, while it may be true that the constitutionality of the HMT was challenged because the HMT taxed goods exported out of the United States, the HMT is clearly derived from internal sources—the U.S. exporter—rather than external sources—the foreign recipient; HMT revenues were collected in the United States from domestic companies based on their use of ports and harbors in this country. Thus both the structure and the content of the HMT point toward it being an internal revenue tax, and thus entitled on refund to the interest award provided under § 2411.

IBM, 201 F.3d at 1371–72. This is also consistent with the court's decision in *BMW Mfg. Corp. v. United States*, in which the court found that the HMT was not a customs duty. 69 F. Supp.2d 1355, 1358 (Ct. of Int'l Trade 1999). *BMW* also recognized that the HMT is a generalized charge for port use. *Id.; see also Texport Oil Co. v. United States*, 185 F.3d 1291, 1297 (Fed. Cir. 1999) ("The HMT is a generalized Federal charge for the use of certain harbors.") There is nothing inconsistent, however, between the general purpose of the charge and its status as an internal revenue tax. As the court recognized in *BMW*, Congress wanted the HMT charge applied as widely as possible. *BMW*, 69 F. Supp.2d at 1358–59.

Against this background, the court addresses whether Congress created an exemption to the HMT tax applicable in this case in order to

serve some other purpose. Congress has provided some exemptions in the HMT act itself for various reasons, including commercial competitiveness. *See, e.g.* 26 U.S.C. § 4462(d)(1) (1994) (relating to bonded commercial cargo); *see also BMW,* 69 F. Supp.2d 1359 n.5. Plaintiff claims no exemption in the HMT statute itself. Plaintiff argues, however, that on its face 19 U.S.C. § 1309, which is not in the Act establishing the HMT, would appear to provide an applicable exemption. The court in *BMW* recognized that other general exemptions found outside the HMT might apply. *BMW,* 69 F. Supp.2d at 1358.

Both parties agree that the key term "internal revenue tax" found in § 1309 does not have an invariable meaning and that statutory purpose is the key. *United States v. Leeb,* 20 F.2d 355, 356 (2d Cir. 1927). As indicated, the purpose of the HMT is clear: to maintain harbors by charging for nearly every port use. 26 U.S.C. § 4461 (1994). Section 1309 has an equally evident purpose of promoting equal footing between U.S. vessels and aircraft with foreign vessels and aircraft. S. Rep. No. 86–1491 (1960), *reprinted in* 1960 U.S.C.C.A.N. 2780, 2785 (quoting with approval from the Bureau of the Budget report that "the original and main purpose for the exemption from duty and taxes of ships' supplies was to place U.S. vessels engaged in foreign trade on an equal footing with foreign vessels. Such exemption extends back to the 19th century tariff acts and was eventually extended to aircraft.") Section 1309's long history will be recounted in brief.

Section 22 of the Act of July 14, 1862, granted the privilege of duty free withdrawal of articles from bonded warehouses to be used as vessels-of-war supplies, if the United States was granted reciprocal privileges. Act of July 14, 1862, § 22, 12 Stat. 543, 560. Section 16 of the Act of June 26, 1884, extended the privilege to any vessel engaged in foreign trade. Act of June 26, 1884, § 16, 1 Rev. Stat. Supp. 440, 443. Section 16 of the Tariff Act of 1897 extended the privilege further to duties and internal revenue taxes on vessel supplies of either foreign or domestic production. Tariff Act of 1897, § 16, 30 Stat. 151, 207 (July 24, 1897). Now, of course, the privilege applies to aircraft as well as vessels. *See* 19 U.S.C. § 1309. The privilege is also reflected in international agreements to which the United States is a party, as befits the reciprocal privilege history of the provision.

Article 24(a) of the Convention on International Civil Aviation (the "Chicago Convention"), exempted fuel and other supplies aboard aircraft in international flight status from taxation. Convention on International Civil Aviation, *opened for signature* Dec. 7, 1944, art. 24(a), 61 Stat. 1180, 1186, 15 U.N.T.S. 295, 310 (entered into force Apr. 4, 1947). The International Civil Aviation organization ("ICAO"), established by the Convention, extended the exemption to fuel and other consumable technical supplies taken abroad. *Policies on Taxation in the Field of In-*

ternational Air Transiport, Section I(1), ICAO Doc. 8632 (3d ed. 2000) [hereinafter "Policies on Taxation"].[2]

Defendant argues that the international agreements do not apply or inform the interpretation of 19 U.S.C. § 1309 because the payor of the tax is a domestic corporation. That does not appear to be a limitation within the agreements.[3] The focus of the agreements, as with § 1309, seems to be reciprocal benefits for aircraft in international flight. The ultimate purchaser, no doubt, would have higher fuel prices passed on to it.

Also, the government argues that, because pursuant to 26 U.S.C. § 4461(c)(2)(B) liability for the HMT attaches at the time of unloading of the imported fuel, the exemption found in the international agreements does not apply. The ICAO policies at issue, however, clearly specify refunds of duties or taxes previously paid. *See Policies on Taxation*, Section I(1).[4]

The resolution at issue specifically covers "import, export, excise, sales, consumption, and internal duties and taxes *of all kinds* levied upon the fuel, lubricants and other consumable technical supplies." *Id.* at Section I(1)(d)(emphasis added). There appears to be no limit to the exemption based on whether it is the airline or the supplier that must pay the tax or when it attaches.

Moreover, 19 U.S.C. § 1309 is not limited by the drawback statute at issue in *Texport*, 185 F.3d at 1296–97. 19 U.S.C. § 1313 (1994) which was at issue there, only allowed drawback of duties paid *upon importation*. There is nothing in either the HMT statute or 19 U.S.C. § 1309 which

---

[2] This principle has remained consistent since 1966, when the ICAO first adopted this policy. *See Policies on Taxation in the Field of International Air Transiport*, Section I, ICAO Doc. 8632-C/968 (2d ed. 1994 and 1st ed. 1966).

[3] This argument seems somewhat nonsensical. Taxes are usually paid by domestic parties and customs duties by United States' importers.

[4] Section I of the applicable policy reads in relevant part:

> The Council resolves that:
>
> 1. With respect to **taxes on fuel, lubricants or other consumable technical supplies:**
>
> a) when an aircraft registered in one Contracting State, or leased or chartered by an operator of that State, is engaged in international air transport to, from or through a customs territory of another Contracting State its fuel, lubricants and other consumable technical supplies shall be exempt from customs or other duties on a reciprocal basis, or alternatively, in the cases of fuel, lubricants and other consumable technical supplies taken on board as per subparagraphs ii) or iii) *such duties shall be refunded*, when:
>
> * * * * * * *
>
> ii) *the fuel, etc., is taken on board for consumption during the flight* when the aircraft departs from an international airport of that other State either for another customs territory of that State or for the territory of any other State, provided that the aircraft has complied, before its departure from the customs territory concerned, with all customs and other clearance regulations in force in that territory;
>
> * * * * * * *
>
> b) the foregoing exemption being based upon reciprocity, no Contracting State complying with this Resolution is obliged to grant to aircraft registered in another Contracting State or aircraft leased or chartered by an operator of that State any treatment more favourable than its own aircraft are entitled to receive in the territory of that other State;
>
> c) notwithstanding the underlying principle of reciprocity, Contracting States are encouraged to apply the exemption, to the maximum extent possible, to all aircraft on their arrival from and departure for other States;
>
> d) *the expression "customs and other duties" shall include import, export, excise, sales, consumption and internal duties and taxes of all kinds* levied upon the fuel, lubricants and other consumable technical supplies; and
>
> e) the duties and taxes described in d) above shall include those levied by any taxing authority within a Contracting State, whether national or local. These duties and taxes shall not be or continue to be imposed on the acquisition of fuel, lubricants or consumable technical supplies used by aircraft in connection with the international air services except to the extent that they are based on the actual costs of providing airports or air navigation facilities and services and used to finance the costs of providing them[.] [Emphases added.]

Policies on Taxation, Section I(1), ICAO Doc. 8632.

indicates an intention to narrow § 1309 so that it would only allow refund of duties or taxes *paid on importation.* Nor is there any sign that Congress wished to disregard specific international commitments on aircraft fuel supplies. Rather, it seems that 19 U.S.C. § 1309 is broadly worded to be consistent with the international agreements discussed herein.[5] The court would be remiss in adopting a narrow reading. Both the plain words of § 1309 and its purpose indicate a refund of the taxes paid should be made.

Accordingly, in each instance at issue herein in which plaintiff qualified for the 19 U.S.C. § 1309 exemption, a refund of the HMT shall be made.

(Slip Op. 00–56)

UNITED STATES, PLAINTIFF *v.* JOSEPH ALMANY, D/B/A J.A. IMPORTS, DAVID JORDAN, INC., AND FAR WEST INSURANCE CO., DEFENDANTS

Court No. 96–02–00384

(Dated May 23, 2000)

David W. Ogden, Acting Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(A. David Lafer, Franklin E. White, Jr.),* for plaintiff

Joseph Almany, defendant *pro se.*

David K. Geren, Esquire, for defendant David Jordan, Inc.

MEMORANDUM AND ORDER TO SHOW CAUSE

MUSGRAVE, *Judge:* Before the Court is Plaintiffs Motion for Entry of Judgment for Civil Penalties which reads as follows:

> In an order dated November 3, 1999, this Court granted the United States' motion for clarification of the Court's decision dated June 3, 1998, and held that defendants Joseph Almany d/b/a J.A. Imports and David Jordan, Inc. were liable to the United States for *fraudulent* violations of 19 U.S.C. § 1592. In that order, the Court ordered the parties to propose scheduling, jointly or separately, for determining the amount of the civil penalty. Plaintiff responds to the Court's order and respectfully requests that the Court enter judgment against defendants Joseph Almany d/b/a J.A. Imports and David Jordan, Inc., and in favor of the United States, in the amount of $258,311.56 with post-judgment interest in the amount established by 28 U.S.C. § 1961(a) and (b)
>
> In the complaint, the United States requested that the Court enter judgment in favor of the United States for $413,138.00 for fraud penalties (or, in the alternative, $4,861,68 for gross negligence pen-

[5] *See supra* note 3.

alties, or $2,430.84 for negligence penalties), plus interest, jointly and severally against defendants Joseph Almany d/b/a J.A. Imports and David Jordan, Inc. In addition, in accordance with 19 U.S.C. § 1592(d), we requested that the Court enter judgment in favor of the United States for $5,016.87, representing the lost customs duties, plus interest, jointly and severally, against all defendants in this case.

In Slip Op. 98–72, dated June 3, 1998, this Court granted the Government's motion for partial summary judgment upon liability and held that the defendants Joseph Almany d/b/a J.A. Imports and David Jordan, Inc., and Far West Insurance Company ("Far West") were jointly and severally liable to the United States for the $ 5,016.87 in lost duties. In a separate order issued on the same day, this Court: (1) ordered defendant's [*sic*] Joseph Almany and David Jordan, Inc. to pay to the United States $5,016.87 plus interest; (2) ordered the parties to schedule a trial for determining whether * * * Joseph Almany's violations resulted from fraud, gross negligence, or negligence; (3) ordered that Joseph Almany indemnify and exonerate Far West from liability under its bond; and (4) removed Far West as a party from this case. The Court subsequently granted judgment in favor of Far West upon Far West's cross-claims against defendant David Jordan, Inc. for indemnification for all or any portion of the bonded amount paid by Far West to the United States.[]

Defendant's Joseph Almany and David Jordan, Inc. have been determined by this Court to be jointly and severally liable for a fraud penalty as a result of violations of 19 U.S.C. § 1592(a) stated in the complaint. Pursuant to 19 U.S.C. § 1592(c)(1), the maximum penalty for fraudulent violations is a penalty which is the equivalent of the domestic value of the merchandise. As defendants have presented no reasons why the maximum penalty should not be imposed in this case, the Court should exercise its discretion to award the United states the maximum penalty permitted resulting from defendant Joseph Almany's egregious "double invoicing" scheme. As is established in the attached declaration of Walter Sawelenko, Field National Import Specialist for watches and clocks, the domestic value of the merchandise entered by means of the 23 entries at issue in this case has been determined to be $258,311.56. Accordingly, this Court should issue a judgment in favor of the United States against defendants, jointly and severally, ordering defendants Joseph Almany d/b/a J.A. Imports and David Jordan, Inc. to pay to the United States $258,311.56.

Plaintiff's Motion was filed April 17, 2000. As of May 22, 2000, neither defendant had responded. *See* CIT Rules 6(c) and 7(d). Defendants are hereby ordered to show cause why judgment should not be granted in favor of The United States of America by June 23, 2000.

(Slip Op. 00–57)

GENESCO INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 92–02–00084

[Judgment for defendant on stipulated facts in lieu of trial.]

(Decided May 23, 2000)

Ross & Hardies (John B. Pellegrini) for plaintiff.
David W. Ogden, Acting Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Barbara M. Epstein*, Esq.); *Chi S. Choy*, Office of the Assistant Chief Counsel, International Trade Litigation, United States Customs Service, of Counsel, for defendant.

INTRODUCTION

WATSON, *Senior Judge:* In this action, the court revisits the hotly contested and somewhat esoteric issue of whether imported footwear has a "foxing-like band," and consequently, subject to a higher rate of duty than would otherwise be assessed on the footwear. Currently before the court is plaintiff's challenge to the classification by the United States Customs Service ("Customs") of six styles of men's and boy's athletic shoes imported by plaintiff that Customs determined have a "foxing-like band." The court's jurisdiction is predicated on 28 U.S.C. § 1581(a).

Upon liquidation of the entries, Customs classified plaintiff's merchandise under the provisions for footwear with outer soles and uppers of rubber or plastics under subheadings 6402.19.50, 6402.19.70, or 6402.99.80 of the Harmonized Tariff Schedule of the United States ("HTSUS"). Plaintiff claims that the subject footwear is properly dutiable under the HTSUS subheadings 6402.19.10 or 6402.99.15 (depending on the model) for footwear with outer soles and uppers of rubber or plastics, which subheadings except footwear having a "foxing-like band applied or molded at the sole and overlapping the upper." Hence, the parties agree that the footwear at issue is properly classifiable under Heading 6402, HTSUS, and the issues in this case revolve around whether plaintiff's footwear has a "foxing-like band" within the meaning of the exception under the subheadings claimed by plaintiff.

STIPULATED FACTS

The parties seek judgment on the basis of the following stipulated facts in lieu of trial, pursuant to the court's order of June 29, 1999, which stipulation references as an exhibit a half-pair of the imports.[1]

The subject footwear comprises six different styles of men's and boy's athletic footwear with rubber/plastic uppers and outer soles. The sole of the footwear consists of an outer sole and mid-sole cemented together. The outer sole overlaps the upper by more than ¼ inch in the toe area

[1] Also, the briefs of the parties make reference to numerous appended documentary exhibits.

extending toward the back of the shoe (approximately ¼ of the length of the shoe) where the ball of the foot would be located. The area overlapped by the sole covers approximately 37.5 percent of the perimeter of the shoe upper. The mid-sole of the shoes begins just forward of the instep and extends to the rear of the shoe and does not overlap the upper. The imported shoes have a separate rubber/plastic piece in the rear or heel area, known as a "heel stabilizer," which is separately cemented to the mid-sole and overlaps the upper by more than ¼ inch. The heel stabilizer feature alone covers approximately 23.1 percent of the perimeter of the shoe. The combined areas of overlap of the outer sole and heel stabilizer cover slightly less than 65 percent of the perimeter of the shoe.

PARTIES' CONTENTIONS

Citing Customs' ruling in T.D. 83–116, 17 Cust. Bull. 229 (1983), at 248, which, *inter alia*, sets forth the characteristics of a "foxing-like band," plaintiff agrees that a "foxing-like band" must resemble the foxing of traditional sneakers and tennis shoes and must encircle or substantially encircle the perimeter of the shoe. Plaintiff argues that in the subject footwear the combination of the outer sole and separate heel stabilizer that overlap the upper does not "substantially encircle" the footwear or have the "visual impact" of the foxing of traditional sneakers and tennis shoes. Plaintiff also posits that the overlap of the upper by the outer sole should not be counted as part of a "foxing-like band," and the heel stabilizer (which encircles only 23.1 percent of the perimeter of the shoe) alone does not constitute a "foxing-like band."

Defendant agrees that, as reflected in Customs rulings T.D. 83–116 and also a later ruling, T.D. 92–108, a "foxing-like band" must resemble the foxing of the traditional sneaker or tennis shoe and must encircle or substantially encircle the perimeter of the footwear. However, seeking judicial deference to T.D. 92–108 and Customs' so-called "40–60" rule, which is used to determine whether footwear is "substantially encircled," defendant contends that the combination of the overlap of the upper by the sole and heel stabilizer encircles nearly 65 percent of the perimeter of the shoe, and therefore, "substantially encircles" the shoe. Defendant argues that the court should defer to T.D. 92–108, because unlike ordinary Customs rulings, T.D. 92–108 was issued after notice-and-comment procedures. Finally, defendant argues there is no support in the statute or its legislative history that an outer sole which overlaps the upper should not be included in the term "foxing-like band."

THE ISSUES

The issues are: (1) whether the alleged foxing-like band found by Customs in the subject footwear "substantially encircles" the perimeter of the shoes; and in making that determination, whether the court may properly defer to Customs' ruling T.D. 92–108; (2) whether an overlap of the upper by the outer sole should be counted in determining whether an alleged "foxing-like band" substantially encircles the perimeter of

the shoe; and (3) whether the gaps in the overlap of the upper between the toe and heel on both sides the shoe preclude a "foxing-like band."

DISCUSSION

1.

THE NIKE DECISION

The meaning of the terms "foxing" and "foxing-like band" as used in the footwear subheadings of the HTSUS is, of course, a question of law. Both parties call attention to *Nissho Iwai American Corp. and Nike, Inc. v. United States*, 143 F. 3d 1470 (Fed. Cir. 1998), *aff'g*, 967 F. Supp. 517 (CIT 1997) ("*Nike*"), in which the Federal Circuit interpreted the statutory terms "foxing" and "foxing-like band." The Federal Circuit described "foxing" as "a band of material, such as rubber, applied to the shoe or boot, as in a Converse All Star®, that overlaps and bonds the sole to the upper." 143 F.3d at 1471–72. As in *Nike*, in the current case it is undisputed that the subject footwear does not have "foxing." Rather Customs posits that the footwear has "foxing-like bands," and therefore, falls within the exception in the subheadings claimed by Genesco.

Further, in *Nike* the court found that, unlike the term "foxing," the term "foxing-like" has no statutory definition, no common meaning, no commercial understanding or designation, and no relevant industry practice on which to rely. *Nike*, 143 F.3d at 1472. Finding the term ambiguous, the appellate court resorted to the *Tariff Classification Study, Explanatory and Background Materials*, Schedule 7 (Nov. 15, 1960) ("TCS") and Customs' ruling in T.D. 83–116. *Nike*, 143 F. 3d at 1472, 1474. From the foregoing, the Federal Circuit concluded that this court "did not err in interpreting the tariff term 'foxing-like band' as applying to athletic shoes having an externally visible band applied or molded at the sole and overlapping the upper, whether or not those shoes are constructed with a mid-sole." 143 F. 3d at 1471.

The Federal Circuit went on to observe that the legislative history of the TSUS indicates the term "foxing-like band" was intended to apply to the broad range of rubber-soled footwear manufactured by the domestic industry, *i.e.*, "sneakers, tennis shoes, basketball shoes, and similar footwear having a visible band formed by the sole overlapping the upper, *i.e.*, having a resemblance to the foxing of the traditional sneaker or tennis shoe." *Id.* 143 F.3d at 1474 ("if the athletic footwear has a visible band formed by the sole overlapping the upper (such that it resembles the traditional sneaker or tennis shoe), it falls within the exclusion.").

Nike's analysis of the legislative history as to the Congressional intent underlying the "foxing-like band" exception is helpful here, but *Nike* did not present the issues raised by plaintiff in the current case, as outlined above.

2.

CUSTOMS' RULINGS

For support of its position that a "foxing-like band" must encircle or substantially encircle the perimeter of the shoe, plaintiff heavily relies

on Customs ruling T.D. 83–116, which was also referred to by the Federal Circuit in *Nike*. There is no dispute in this case that a foxing-like band must encircle or substantially encircle the perimeter of the shoe, but the parties sharply disagree as to whether the subject footwear possesses that characteristic.

Defendant insists that the alleged foxing-like band, which encircles nearly 65 percent of the perimeter of the shoe, "substantially encircles" the subject shoes, citing Customs ruling T.D. 92–108, issued after notice-and-comment procedures. That ruling makes clear that even though the TSUS was superceded by the HTSUS, effective January 1, 1989, the guidelines of T.D. 83–116 are still followed by Customs with regard to the classification of footwear under the HTSUS. 26 Customs Bulletin 362, at 363 (1992).

The so-called "40–60" rule outlined in, and continued by, T.D. 92–108, 26 Cust. Bull., at 364, is a measurement used by Customs import specialists to assist them in making a determination pertaining to the issue of whether there is a "substantial" encirclement within the purview of T.D. 83–116 and T.D. 92–108. Generally, under the "40–60" rule, an encirclement of less than 40 percent of the perimeter of the shoe by the band does not constitute a "substantial" encirclement, and thus indicates there is no foxing or a foxing-like band. Encirclements of between 40 and 60 percent of the perimeter of the shoe by the band may or may not constitute a foxing or a foxing-like band depending on whether the band functions or looks like a foxing according to certain criteria. Encirclement exceeding 60 percent of the perimeter of the shoe by the band, as in the current case, is always considered "substantial encirclement."

Among many of the great difficulties presented by the statutory term "foxing-like band" is that according to Customs' interpretation and rulings (T.D. 83–116 is undisputed by plaintiff), it must encircle or "substantially" encircle" the shoe, but there has been great controversy concerning what percentage of encirclement is "substantial." The term "substantially encircles," however, was entirely a creature of the 1983 ruling, as nothing in the statute, its legislative history, or any common or trade meaning of "foxing" or "foxing like band" refers to such characteristic. The term "substantially" when used as a quantitative modifier of "encircle," is very imprecise, has many nuances, and is itself a rather broad term requiring interpretation in specific cases. Nonetheless, in T.D. 83–116 Customs entirely refrained from quantifying the amount of encirclement that would be considered as "substantial," presumably leaving the issue to be decided on a case by case basis taking all relevant factors into consideration. However, as indicated in T.D. 92–108, the footwear importers stated that is imperative that they have an objective standard to rely on in order to accurately determine pricing, and in connection with the 1992 ruling proffered to Customs various definitions of "substantial encirclement."

Prior to issuance of T.D. 92–108, footwear importers as well as the domestic footwear manufacturers had urged Customs to change its "40–60" practice and proposed various other percentages of encirclement qualifying as "substantial," *i.e.*, 30–50 percent, 51 percent, and 60 or 75 percent. *See* "26 Cust. Bull. at 364–65. However, after thorough consideration of numerous comments from the public, various definitions and proposed percentages by the domestic footwear and importing communities, Customs decided in T.D. 92–108, that it would continue to implement the term "substantially encircle" for foxing-like bands in accordance with its "40–60" rule, assuring uniformity in the implementation of the term "substantially encircle" at the various ports. *See* 26 Cust. Bull. at 368. The decision of Customs that plaintiff's footwear has a foxing-like band that "substantially encircles" the shoe was thus made pursuant to Customs' rulings in T.D. 83–116, T.D. 92–108, and the "40–60" rule.

3.

CHEVRON DEFERENCE TO CUSTOMS RULINGS

The court now turns to defendant's contention that T.D. 92–108, which was published after notice-and-comment procedures, should be accorded deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) ("*Chevron*"). Plaintiff agrees with the characteristics of a foxing-like band as set forth in T.D. 83–116 and T.D. 92–108, and concedes that *Chevron* deference to notice-and-comment rulings is an "open question." *Pltf's Reply Br.* at 2. We first address whether under the facts and circumstances of this case, and judicial authority, the court may properly defer to an interpretive Customs ruling, like T.D. 92–108, issued after notice-and-comment procedures.

A.

THE *MEAD* DECISION

In *Mead Corp. v. United States*, 185 F.3d 1304 (Fed. Cir. 1999), the Federal Circuit stressed that, unlike ordinary rulings, regulations issued by Customs are subject to the procedural rigors dictated by the Administrative Procedure Act, *see* 5 U.S.C. § 553 (1994), therefore must first undergo notice-and-comment procedures, *see* 5 U.S.C. § 553(c), and are subject to other procedural safeguards, *see* 5 U.S.C. § 553(e). Citing *Haggar v. United States*, 119 S. Ct. 1392 (1999), which accorded a Customs interpretive regulation *Chevron* deference, *Mead* points up that a regulation represents a reasoned and informed articulation of Customs' statutory interpretation, which serves to "clarify the rights and obligations of importers." 185 F. 3d at 1307.

Mead holds that *Haggar's* reach (and thus *Chevron* deference) does not extend to "ordinary" or "typical" Customs rulings, *see* 19 C.F.R. § 177.0, 177.1(a) (1998), which do not involve such procedural safeguards as public debate or discussion, are confined to specific facts and parties to a particular transaction at issue, and unlike regulations, are

not intended to clarify the rights and obligations of importers beyond the specific matter under review. *See* 19 C.F.R. § 177.1(d)(1). However, *Mead* expressly reserved decision as to whether *Chevron* deference applies to "[c]ertain rulings—specifically those which have the 'effect of changing a practice'—undergo notice-and-comment procedures, 19 C.F.R. § 177.10(c) (1998)." 185 F.3d at 1307, n.1.

In T.D. 92–108, Customs stated that since a change in the interpretation of "substantially encircle" would affect the duty charged to imported footwear, comments from the domestic manufacturers as well as the footwear importing community were requested by notice published in the Customs Bulletin on June 3, 1992. Customs also stated in T.D. 92–108 that the comments received were carefully considered prior to determining that the existing interpretation of "substantially encircle" under the so-called "40–60" rule need not be changed. *Id.*, 26 Cust. Bull. at 262.

Accordingly, unlike the ordinary ruling in *Mead*, which was not accorded *Chevron* deference, T.D. 92–108 was issued after notice-and-comment procedures, published in the Customs Bulletin, is not limited to the facts of a particular case or to certain parties, was a sequel to and interpretive of a prior long-standing and consistently followed notice-and-comment ruling, T.D. 83–116 (which was relied on *Nike*), and continued the uniform application of the "40–60" rule interpreting "substantially encircled" as that term is used in T.D. 83–116.

In sum, although T.D. 92–108 is clearly an authoritative articulation of Customs' interpretation of the statutory term "foxing-like band," and the term "substantially encircle," it is nonetheless a ruling, albeit issued after notice-and-comment procedures, but is not a regulation. Therefore, *Mead* does not tell us how much, if any, deference this court should accord to a notice-and-comment interpretive ruling, but expressly leaves that matter open.

B.

THE SUPREME COURT'S RECENT *CHRISTENSEN* DECISION

Recently, in *Christensen v. Harris County*, 2000 U.S. Lexis 3003 (U.S. Supreme Court May 1, 2000), a Supreme Court majority opinion (Justice Thomas writing for the majority, joined by Rehnquist, C.J., and Justices O'Connor, Kennedy, and Souter) held that unlike an interpretive regulation construing an ambiguous statute, *Chevron* deference does not apply to an "opinion letter" issued by the Acting Administrator of the United States Department of Labor's Wage and Hour Division ("Labor"), because Labor's interpretation of the statute at issue was "not one arrived at after, for example, a formal adjudication or *notice-and-comment rule-making*." While rejecting *Chevron* deference for policy statements, interpretive rules, agency manuals, and enforcement guidelines lacking the force of law, the *Christensen* majority opinion recognizes that instead of *Chevron*-style deference, interpretations contained in formats such as opinion letters are "entitled to respect," but only to the extent that they are persuasive, citing *Skidmore v. Swift &*

Co., 323 U.S. 134, 140 (1944) and *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, at 256–58 (1991). The *Christensen* majority found that Labor's opinion letter was not persuasive as to the correct interpretation of the statute.

Justice Scalia concurred in the judgment and wrote a separate concurring (in part) opinion, in which he disagreed with the majority view that Labor's opinion letter was entitled to no more than "Skidmore deference," citing cases showing that the Court had accorded *Chevron* deference not only to agency regulations, but also to "authoritative agency positions set forth in a variety of other formats." Accordingly, Scalia held that Labor's opinion letter warranted *Chevron* deference, "if it represents the authoritative view of the Department of Labor." However, Scalia agreed with the majority's interpretation of the statute at issue, and rejected Labor's interpretation of the statute as set forth in the opinion letter.

Dissenting opinions by Justices Stevens (joined by Justices Ginsburg and Breyer) and by Justice Breyer (joined by Justice Ginsburg) agreed with the majority view that under *Skidmore*, an authoritative agency interpretation, thoroughly considered and consistently observed, "unquestionably merits our respect," and may well warrant *Chevron* deference. As observed by Justice Breyer: "*Skidmore* made clear that courts may pay particular attention to the views of an expert agency where they represent 'specialized experience,' 323 U.S. at 139, even if they do not constitute an exercise of delegated lawmaking authority." Continuing, Breyer noted, "The [Supreme] Court held that the rulings, interpretations and opinions of an agency, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."

In *Christensen*, Labor's interpretive opinion letter was not a notice-and-comment ruling, and none of the opinions in that case specifically address that type of ruling. Nonetheless, the *Christensen* majority opinion, the concurring (in part) opinion of Justice Scalia, and the views of the dissenting justices Stevens, Breyer and Justice Ginsburg, all strongly suggest that interpretive rulings issued after notice-and-comment procedures, merit at the least the respect of the court, if not *Chevron* deference. Consequently, this court will be guided by T.D. 92–108 and the "40–60" rule to the extent that they apply under the facts of this case, and are a reasonable application of "substantially encircle."

C.

REASONABLENESS OF THE "40–60" RULE AS TO THE ENCIRCLEMENT IN THIS CASE.

The statute requires only that a foxing-like band be applied or molded at the sole and overlap the upper, and there is no reference to the extent of the encirclement of the perimeter of the shoe. Additionally, there is nothing in the legislative history that would require that a "foxing-like

band" completely, or even substantially, encircle the shoe,[2] or have no gaps (see discussion *infra* concerning gaps). The parties agree that, as stated in Customs' rulings, a "foxing-like band" must either encircle or "substantially" encircle the shoe. Under T.D. 92–108 and the "40–60" rule, an encirclement of slightly less than 65 percent would be regarded by Customs as "substantially encircle" under T.D. 83–116 and T.D. 92–108. Plaintiff, however, contends that such percentage is unreasonably low to be "substantial" and unsupported by judicial authority.

In T.D. 92–108, after notice-and-comment procedures and much skirmishing between the domestic manufacturers of footwear and footwear importers over percentages of encirclement, the agency decided that its "40–60" guideline for interpreting "substantially encircled" should be continued. Given the imperatives of specifically quantifying the extent of encirclement of a "foxing-like band," and the term "substantially" itself for purposes of Customs' rulings as to the characteristics of a "foxing-like" band, it makes eminent sense to accord, if not *Chevron* deference, at least *Skidmore* respect, to T.D. 92–108 and the "40–60" rule to the extent they apply under the facts of this case and are reasonable. This approach accords with that of the Federal Circuit in *Nike*, where in addition to the *Tariff Classification Study*, the appellate court buttressed its conclusions with references to T.D. 83–116, which was also issued after notice-and-comment procedures, and is continued under T.D. 92–108.

The parties have stipulated that in plaintiff's footwear there is an encirclement of slightly less than 65 percent of the perimeter of the upper by the combination of the overlapping sole and heel stabilizer, which percentage plaintiff maintains is insufficient encirclement to qualify as "substantially encircle" under T.D. 83–116. To reiterate, under the "40–60" rule continued under T.D. 92–108 Customs' position is that an encirclement exceeding 60 percent of the perimeter of the shoe is "substantial encirclement." *See* 26 Cust. Bull. at 364 (encirclement exceeding 60 percent is "substantial encirclement"). The issue of the reasonableness of Customs' interpretation of "substantially encircle" under T.D. 92–108, while a question of law, must be adjudicated in the context of the factual situation before the court, and not adjudicated on hypothetical percentages or facts.[3] For the following reasons the court holds that as applied to the stipulated facts of the current case, in which there is a nearly 65 percent encirclement, the court holds that such per-

---

[2] In T.D. 92–108, there appears to be an inconsistency in the language "encircle or substantially encircle the entire shoe." Since "substantially encircle" allows for something less than encirclement of the entire perimeter of the shoe, *a fortiori* a foxing-like band cannot "substantially" encircle the "entire" perimeter of the shoe. Hence, the court reads Customs' rulings to mean that a foxing-like band must either encircle the entire shoe or substantially encircle the shoe, but not "substantially" encircle the "entire" shoe.

[3] While the situation is not before the court, in any event there is no dispute that an encirclement of less than 40 percent does not constitute "substantial encirclement." Also, while the situation is not before the court, as to the range of 40–60 percent encirclement, it is significant that Customs looks to additional criteria and facts to determine whether a band functions or looks like a foxing. Since the parties have stipulated in this case that encirclement exceeds the 60 percent threshold, which Customs regards as "substantially encircle" in all cases, the issue of the reasonableness of percentages of encirclement within the 40–60 percent range is not presented for decision in this case, and the court declines to address such other percentages not before the court in this case in merely dictum. However, no inference should be drawn from anything stated in this opinion as to the "40–60" rule with respect to percentages of encirclement less than that involved here.

centage of encirclement is sufficient to constitute a "substantial" encirclement for purposes of the term "foxing-like band."

In T.D. 92–108, Customs notes: "[n]one of the definitions [submitted to Customs] actually quantify 'substantial.' It is always expressed in other terms which clearly convey the meaning. Certainly, a 40% encirclement is a substantial encirclement of the perimeter of the shoe in that it conforms exactly to the dictionary definitions of 'substantial' by being ample, considerable in quantity, significantly large and largely, but not wholly that which is specified." 26 Cust. Bull. at 366. When the term "substantially" is used as an adverb preceding a verb, the term means "in a substantial manner: so as to be substantial." *Webster's Third New International Dictionary of the English Language Unabridged* (1968).

Plaintiff, however, posits on the basis of certain judicial authorities that a "substantial" encirclement requires at least 70 percent encirclement. *Plt'fs Br.* at 4, 10, 15, and 21. Plaintiff submits admittedly "not perfect" references to California judicial decisions construing the term "substantially surrounded" for purposes of annexation of unincorporated property, and certain Customs' decisions addressing the "substantially complete" test for an unfinished article, *i.e.*, at least 77 percent of the costs of the complete article. The court has also considered the term "substantial" and "substantially" as addressed by courts and federal agencies in other unrelated contexts, as proffered by both parties. Extended discussion of such decisions is deemed unnecessary as the court has concluded that application of the terms in those cases, resulting in a range of percentages (ones as low as 16 and 25 and as high as 89), was context dependent and those cases are not relevant to whether slightly less than 65 percent encirclement reasonably defines whether a shoe is "substantially" encircled by the alleged foxing-like band.

4.

PLAINTIFF'S "VISUAL IMPACT" ARGUMENT

Plaintiff further contends that the gaps in the overlap of the upper by the sole and heel stabilizer between the toe and heel on both sides of the shoe prevent the requisite "visual impact" of the foxing of the traditional sneaker or tennis shoe—in which the *foxing* completely encircles the perimeter of the shoe, without gaps—and, therefore, the subject footwear has no foxing-like band. The court disagrees. In *Nike*, the Federal Circuit held that "foxing-like" refers to a band overlapping the upper that is similar to or resembles the foxing found on a traditional sneaker or tennis shoe, *i.e.*, a "visible band formed by the sole and overlapping the upper." *Nike*, 143 F. 3d at 1474. However, gaps in a "foxing-like" band are permissible provided that the band still substantially encircles the perimeter of the shoe. Plaintiff's contention that the gaps in the subject footwear preclude the visual impact of foxing is simply an extension of plaintiff's argument that the overlapping sole and heel stabilizer do not substantially encircle the shoe, which the court rejects.

5.

EXCLUSION OF SOLES THAT OVERLAP THE UPPER FROM A FOXING-LIKE BAND

Finally, plaintiff argues that the "foxing-like" band exception does not apply to soles which overlap the upper. Plaintiff notes that in HTSUS subheading 6404.19.40 (which is not involved in this case) there are two exceptions: one exception for footwear having a foxing or foxing-like band applied to or molded at the sole and overlapping the upper, and an additional and separate exception for footwear with soles overlapping the upper. Plaintiff insists that the two exceptions must be construed as mutually exclusive since if the foxing-like band exception includes soles which overlap the upper, the second exception for footwear with soles which overlap the upper would be rendered superfluous. Thus, plaintiff urges the court to exclude the overlapping outer sole of the subject footwear, leaving only the heel stabilizer covering approximately 23.1 percent of the perimeter of the subject shoes, which is not "substantial encirclement." *Pltf's Br.* at 18. Defendant argues that the legislative history of the second exception, which covers footwear with soles overlapping the upper *other than at the toe or heel* shows that Congress intended only to cover a particular form of footwear known as a "jogger," and that the first exception for a "foxing-like band" may include soles which overlap the upper. In *Nike*, it was undisputed that the overlap of the outer sole was "foxing-like." 143 F. 3d at 1472. Moreover, the legislative history addressed in *Nike* clearly shows that a visible band formed by the sole overlapping the upper falls within the foxing-like band exception. *Id.* at 1474.

In short, plaintiff's construction of the term "foxing-like band" to exclude soles overlapping the upper must be rejected as contrary to express language of the statute and relevant legislative history.

CONCLUSION

Judgment dismissing the action is entered accordingly.

(Slip Op. 00–58)

SKF USA INC. AND SKF SVERIGE AB, PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND TORRINGTON CO., DEFENDANT-INTERVENOR

Court No. 97–11–02008

Plaintiffs, SKF USA Inc. and SKF Sverige AB (collectively "SKF"), move pursuant to USCIT R. 56.2 for judgment upon the agency record challenging various aspects of the Department of Commerce, International Trade Administration's ("Commerce") final determination, entitled *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Singapore, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews*, 62 Fed. Reg. 54,043 (Oct. 17, 1997), as amended, *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore[,] Sweden and the United Kingdom; Amended Final Results of Antidumping Duty Administrative Reviews*, 62 Fed. Reg. 61,963 (Nov. 20, 1997).

Specifically, SKF contends that Commerce erred in: (1) conducting a duty absorption inquiry under 19 U.S.C. § 1675(a)(4) (1994) for the seventh administrative review of the applicable antidumping duty order; (2) determining that it applied a reasonable duty absorption methodology and that duty absorption had in fact occurred; (3) using aggregate data of all foreign like products under consideration for normal value in calculating profit for constructed value ("CV") under 19 U.S.C. § 1677b(e)(2)(A) (1994); and (4) excluding below-cost sales from the CV profit calculation.

Commerce responds that it properly: (1) conducted a duty absorption inquiry under § 1675(a)(4); (2) used a reasonable methodology and determined that duty absorption existed; (3) calculated CV profit pursuant to § 1677b(e)(2)(A); and (4) excluded below-cost sales from the CV profit calculation. The Torrington Company presents arguments similar to those of the defendant.

Held: SKF's USCIT R. 56.2 motion is denied in part and granted in part. The case is remanded to Commerce to annul all findings and conclusions made pursuant to the duty absorption inquiry conducted for the subject review.

[SKF's motion is denied in part and granted in part. Case remanded.]

(Dated June 1, 2000)

Steptoe & Johnson LLP (Herbert C. Shelley and *Alice A. Kipel)* for SKF USA Inc. and SKF Sverige AB.

David W. Ogden, Acting Assistant Attorney General; *David M. Cohen*, Director, *Velta A. Melnbrencis*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice; of counsel: *Myles S. Getlan* and *David R. Mason*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, for defendant.

Stewart and Stewart (Terence P. Stewart, Wesley K. Caine, Geert De Prest and *Lane S. Hurewitz)* for The Torrington Company.

OPINION

TSOUCALAS, *Senior Judge:* Plaintiffs, SKF USA Inc. and SKF Sverige AB (collectively "SKF"), move pursuant to USCIT R. 56.2 for judgment upon the agency record challenging various aspects of the Department of Commerce, International Trade Administration's ("Commerce") final determination, entitled *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Singapore, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews* ("*Final Results*"), 62 Fed. Reg. 54,043 (Oct. 17, 1997), as amended, *Antifriction Bearings (Other Than Tapered*

Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore[,] Sweden and the United Kingdom; Amended Final Results of Antidumping Duty Administrative Reviews ("*Amended Final Results*"), 62 Fed. Reg. 61,963 (Nov. 20, 1997).

Specifically, SKF contends that Commerce erred in: (1) conducting a duty absorption inquiry under 19 U.S.C. § 1675(a)(4) (1994) for the seventh administrative review of the applicable antidumping duty order; (2) finding that it applied a reasonable duty absorption methodology and that duty absorption had in fact occurred; (3) using aggregate data of all foreign like products under consideration for normal value ("NV") in calculating profit for constructed value ("CV") under 19 U.S.C. § 1677b(e)(2)(A) (1994); and (4) excluding below-cost sales from the CV profit calculation.

Commerce responds that it properly: (1) conducted a duty absorption inquiry under § 1675(a)(4); (2) used a reasonable duty absorption methodology and determined that duty absorption existed; (3) calculated CV profit pursuant to § 1677b(e)(2)(A); and (4) excluded below-cost sales from the CV profit calculation. The Torrington Company ("Torrington") presents arguments similar to those of the defendant.

The Court will address each of these arguments in turn.

BACKGROUND

On May 15, 1989, Commerce published antidumping duty orders on antifriction bearings (other than tapered roller bearings) and parts thereof ("AFBs") imported from several countries, including Sweden. *See Antidumping Duty Orders: Ball Bearings, Cylindrical Roller Bearings, and Parts Thereof From Sweden*, 54 Fed. Reg. 20,907. This case concerns the seventh administrative review of the antidumping duty order on AFBs from Sweden for the period of review ("POR") covering May 1, 1995 through April 30, 1996. In accordance with 19 C.F.R. § 353.22(c) (1995), Commerce initiated the seventh review on June 20, 1996.[1] *See Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom; Initiation of Antidumping Duty Administrative Reviews and Notice of Request for Revocation of an Order*, 61 Fed. Reg. 31,506 (June 20, 1996). On June 10, 1997, Commerce published the preliminary results of the seventh review. *See Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden and the United Kingdom; Preliminary Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews* ("*Preliminary Results*"), 62 Fed. Reg. 31,566. Commerce published the *Final Results* on October 17, 1997, *see* 62 Fed. Reg. at 54,043, and the *Amended Final Results* on November 20, 1997, *see* 62 Fed. Reg. at 61,963.

[1] Since the administrative review at issue was initiated after December 31, 1994, the applicable law in this case is the antidumping statute as amended by the Uruguay Round Agreements Act ("URAA"), Pub. L. No. 103-465, 108 Stat. 4809 (1994) (effective Jan. 1, 1995).

JURISDICTION

The Court has jurisdiction over this matter pursuant to 19 U.S.C. § 1516a(a) (1994) and 28 U.S.C. § 1581(c) (1994).

STANDARD OF REVIEW

In reviewing a challenge to Commerce's final determination in an antidumping administrative review, the Court will uphold Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (1994).

DISCUSSION

I. *Commerce's Duty Absorption Inquiry*

A. Background

On May 31, 1996 and July 9, 1996, Torrington requested that Commerce conduct a duty absorption inquiry pursuant to 19 U.S.C. § 1675(a)(4) with respect to various respondents, including SKF, to determine whether antidumping duties had been absorbed during the POR. *See Final Results*, 62 Fed. Reg. at 54,075.

In the *Final Results*, Commerce found that duty absorption had occurred for the POR. *See id.* at 54,044. In asserting authority to conduct a duty absorption inquiry under § 1675(a)(4), Commerce first explained that for "transition orders" as defined in 19 U.S.C. § 1675(c)(6)(C) (1994) (that is, antidumping duty orders, *inter alia*, deemed issued on January 1, 1995), antidumping regulation 19 C.F.R. § 351.213(j)(2) (1997) provides that Commerce "will make a duty absorption determination, if requested, for any administrative review initiated in 1996 or 1998." *Id.* at 54,074 (citing *19 CFR Part 351 et al., Antidumping Duties; Countervailing Duties; Final [R]ule*, 62 Fed. Reg. 27,296, 27,394 (May 19, 1997)). Commerce also noted that although the regulation is not binding upon Commerce for this AFB review, it does constitute a public statement of how Commerce expects to proceed in construing § 1675(a)(4).[2] *See id.* Commerce concluded that (1) because the antidumping duty order on the AFBs in this case have been in effect since 1989, the order is a transition order pursuant § 1675(c)(6)(C), and (2) since this review was initiated in 1996 and a request was made, it had the authority to make a duty absorption inquiry for this POR. *See id.* at 54,075.

B. Contentions of the Parties

SKF argues that: (1) Commerce lacked authority under 19 U.S.C. § 1675(a)(4) to conduct a duty absorption inquiry for the seventh administrative review of the 1989 antidumping duty order; and (2) even if Commerce possessed the authority to conduct such an inquiry, Com-

[2] Although 19 C.F.R. § 351.213(j) (1997) is indicative of Commerce's interpretation of the URAA, the regulation does not apply here because the administrative review in this case was initiated on June 20, 1996 pursuant to a request dated May 31, 1996. Commerce's regulations that were issued pursuant to the URAA apply only to "administrative reviews initiated on the basis of requests made on or after the first day of July, 1997." *19 CFR Part 351 et al., Antidumping Duties; Countervailing Duties; Final [R]ule*, 62 Fed. Reg. 27,296, 27,416–17 (May 19, 1997).

merce's methodology for determining duty absorption was contrary to law and, accordingly, the case should be remanded to Commerce to reconsider its methodology. *See* SKF's Br. Supp. Mot. J. Agency R. at 3, 9–38; SKF's Reply Br. at 2–24.

Commerce argues it properly construed subsections (a)(4) and (c) of § 1675 as authorizing it to make duty absorption inquiries for antidumping duty orders that were issued and published prior to January 1, 1995. *See* Def.'s Mem. in Opp'n to Pls.' Mot. J. Agency R. at 2, 5–14. Commerce also asserts that it devised and applied a reasonable methodology for determining duty absorption. *See id.* at 2, 14–22. Torrington generally agrees with Commerce's contentions. *See* Torrington's Resp. to Pls.' Mot. J. Agency R. at 2–3, 6–27.

C. Analysis

In *SKF USA Inc. v. United States*, 24 CIT ____, Slip Op. 00–28 (Mar. 22, 2000), this Court determined that Commerce lacked statutory authority under 19 U.S.C. § 1675(a)(4) to conduct a duty absorption inquiry for antidumping duty orders issued prior to the January 1, 1995 effective date of the Uruguay Round Agreements Act ("URAA"). *See* Pub. L. No. 103–465, 108 Stat. 4809 (1994). *See id.* at ____, Slip Op. 00–28, at 21. The Court noted that Congress expressly prescribed in the URAA that § 1675(a)(4) "must be applied prospectively on or after January 1, 1995 for 19 U.S.C. § 1675 reviews." *Id.* (citing § 291 of the URAA).

Because the duty absorption inquiry, the methodology and the parties' arguments at issue in this case are practically identical to those presented in *SKF USA*, the Court adheres to its reasoning in *SKF USA*. The Court, therefore, finds that Commerce did not have the statutory authority under § 1675(a)(4) to undertake a duty absorption inquiry for the applicable pre-URAA antidumping duty order in dispute here.

II. *Commerce's CV Profit Calculation*

A. Background

For this POR, Commerce "used CV as the basis for NV when there were no usable sales of the foreign like product in the comparison market." *Preliminary Results*, 62 Fed. Reg. at 31,571. Commerce calculated the profit component of CV using the statutorily preferred methodology of 19 U.S.C. § 1677b(e)(2)(A).[3] *See Final Results*, 62 Fed. Reg. at 54,062. In applying the preferred methodology for calculating CV profit under § 1677b(e)(2)(A), Commerce determined that "the use of aggregate data that encompasses all foreign like products under consideration for NV results in a practical measure of profit that [it] can apply consistently in each case." *Id.* Also, in calculating CV profit under § 1677b(e)(2)(A), Commerce excluded below-cost sales from the calculation which it disregarded in the determination of NV pursuant to 19 U.S.C. § 1677b(b)(1)

[3] Specifically, in calculating constructed value, the statutorily preferred method is to calculate an amount for profit based on "the actual amounts incurred and realized by the specific exporter or producer being examined in the investigation or review * * * in connection with the production and sale of a foreign like product [made] in the ordinary course of trade." 19 U.S.C. § 1677b(e)(2)(A) (1994).

(1994). *See id.* at 54,063. Commerce excluded such below-cost sales because: (1) § 1677b(e)(2)(A) requires Commerce to use the actual amount for profit in connection with the production and sale of a foreign like product in the ordinary course of trade; and (2) 19 U.S.C. § 1677(15) (1994) provides that below-cost sales disregarded under § 1677b(b)(1) are considered to be outside the ordinary course of trade. *See id.*

B. Contentions of the Parties

SKF contends that Commerce's use of aggregate data that encompasses all foreign like products under consideration for NV for calculating CV profit is contrary to § 1677b(e)(2)(A) and to the explicit hierarchy established by § 1677(16) for selecting "foreign like product" for the CV profit calculation. *See* SKF's Br. Supp. Mot. J. Agency R. at 4, 37–59; SKF's Reply Br. at 24–44. In addition, SKF argues, *inter alia*, that Commerce's CV profit calculation under § 1677b(e)(2)(A) is unlawful in that it excluded below-cost sales from the calculation. *See id.*

Commerce responds that it applied a reasonable interpretation of § 1677b(e)(2)(A) and properly based CV profit for SKF on aggregate profit data of all foreign like products under consideration for NV. *See* Def.'s Mem. in Opp'n to Pls.' Mot. J. Agency R. at 2–3, 25–42. Also, Commerce asserts that it properly excluded below-cost sales. *See id.* at 39. Torrington generally agrees with Commerce. *See* Torrington's Resp. to Pls.' Mot. J. Agency R. at 3–4, 28–31.

C. Analysis

In *RHP Bearings Ltd. v. United States*, 23 CIT ____, 83 F. Supp. 2d 1322 (1999), this Court upheld Commerce's CV profit methodology of using aggregate data of all foreign like products under consideration for NV as being consistent with the antidumping statute. *See id.* at ____, 83 F. Supp. 2d at 1336. Since SKF's arguments and the methodology at issue in this case are practically identical to those presented in *RHP Bearings*, the Court adheres to its reasoning in *RHP Bearings* and, therefore, finds that Commerce's CV profit methodology and exclusion of below-cost sales to be supported by substantial evidence and in accordance with law.

III. *Other Issues*

The Court has considered SKF's other arguments to the *Final Results*, but finds them unpersuasive.

Conclusion

For the foregoing reasons, the case is remanded to Commerce to annul all findings and conclusions made pursuant to the duty absorption inquiry conducted for the subject review. Commerce's final determination is affirmed in all other respects.

(Slip Op. 00–59)

SKF USA INC., SKF FRANCE S.A., SARMA, SKF GMBH, SKF INDUSTRIE S.P.A. AND SKF SVERIGE AB, PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND TORRINGTON CO., DEFENDANT-INTERVENOR

Court No. 98–07–02540

Plaintiffs, SKF USA Inc., SKF France S.A., Sarma, SKF GmbH, SKF Industrie S.p.A. and SKF Sverige AB (collectively "SKF"), move pursuant to USCIT R. 56.2 for judgment upon the agency record challenging various aspects of the Department of Commerce, International Trade Administration's ("Commerce") final determination, entitled *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews*, 63 Fed. Reg. 33,320 (June 18, 1998), as amended, *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From Italy, Romania, and the United Kingdom; Amended Final Results of Antidumping Duty Administrative Reviews*, 63 Fed. Reg. 40,878 (July 31, 1998).

Specifically, SKF contends that Commerce erred in: (1) using aggregate data of all foreign like products under consideration for normal value in calculating profit for constructed value ("CV") under 19 U.S.C. § 1677b(e)(2)(A) (1994); and (2) excluding below-cost sales from the CV profit calculation.

Commerce responds that it properly (1) calculated CV profit pursuant to § 1677b(e)(2)(A); and (2) excluded below-cost sales from the CV profit calculation. The Torrington Company agrees with Commerce's determinations.

Held: SKF's USCIT R. 56.2 motion is denied. Commerce's final determination is affirmed in all respects.

[SKF's motion is denied. Case affirmed.]

(Dated June 1, 2000)

Steptoe & Johnson LLP (Herbert C. Shelley) for SKF USA Inc., SKF France S.A., Sarma, SKF GmbH, SKF Industrie S.p.A. and SKF Sverige AB.

David W. Ogden, Acting Assistant Attorney General; *David M. Cohen*, Director, *Velta A. Melnbrencis*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice; of counsel: *David R. Mason*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, for defendant.

Stewart and Stewart (Terence P. Stewart, Geert De Prest and *Lane S. Hurewitz)* for The Torrington Company.

OPINION

TSOUCALAS, *Senior Judge:* Plaintiffs, SKF USA Inc., SKF France S.A., Sarma, SKF GmbH, SKF Industrie S.p.A. and SKF Sverige AB (collectively "SKF"), move pursuant to USCIT R. 56.2 for judgment upon the agency record challenging various aspects of the Department of Commerce, International Trade Administration's ("Commerce") final determination, entitled *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews*, 63 Fed. Reg. 33,320 (June 18, 1998), as amended, *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From Italy, Romania, and the United Kingdom; Amended Final Results of Antidumping Duty Administrative Reviews* ("*Amended Final Results*"), 63 Fed. Reg. 40,878 (July 31, 1998).

BACKGROUND

This case concerns the eighth administrative review of 1989 antidumping duty orders on antifriction bearings (other than tapered roller bearings) and parts thereof imported from several countries, including France, Germany, Italy and Sweden, for the period of review ("POR") covering May 1, 1996 through April 30, 1997. In accordance with 19 C.F.R. § 353.22(c) (1995), Commerce initiated the administrative reviews of these orders on June 17, 1997 and August 28, 1997, and published the preliminary results of the subject reviews on February 9, 1998.[1] *See Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, and [t]he United Kingdom* ("*Preliminary Results*"), 63 Fed. Reg. 6512 (Feb, 9, 1998) (citations omitted). Commerce published the *Final Results* on June 18, 1998, *see* 63 Fed. Reg. at 33,320, and the *Amended Final Results* on July 31, 1998, *see* 63 Fed. Reg. at 40,878.

JURISDICTION

The Court has jurisdiction over this matter pursuant to 19 U.S.C. § 1516a(a) (1994) and 28 U.S.C. § 1581(c) (1994).

STANDARD OF REVIEW

In reviewing a challenge to Commerce's final determination in an antidumping administrative review, the Court will uphold Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (1994).

DISCUSSION

I. *Commerce's CV Profit Calculation*

A. Background

For this POR, Commerce used constructed value ("CV") as the basis for normal value ("NV") "when there were no usable sales of the foreign like product in the comparison market." *Preliminary Results*, 63 Fed. Reg. at 6516. Commerce calculated the profit component of CV using the statutorily preferred methodology of 19 U.S.C. § 1677b(e)(2)(A).[2] *See Final Results*, 63 Fed. Reg. at 33,333. In applying the preferred methodology for calculating CV profit under § 1677b(e)(2)(A), Commerce determined that the use of aggregate data that encompasses all foreign like products under consideration for NV results in a practical measure of profit that it can apply consistently in each case. *See id.* Also, since § 1677b(e)(2)(A) requires Commerce to use the actual amount for profit in connection with the production and sale of a foreign like prod-

---

[1] Since the administrative review at issue was initiated after December 31, 1994, the applicable law in this case is the antidumping statute as amended by the Uruguay Round Agreements Act ("URAA"), Pub. L. No. 103-465, 108 Stat. 4809 (1994) (effective Jan. 1, 1995).

[2] Specifically, in calculating constructed value, the statutorily preferred method is to calculate an amount for profit based on "the actual amounts incurred and realized by the specific exporter or producer being examined in the investigation or review * * * in connection with the production and sale of a foreign like product [made] in the ordinary course of trade." 19 U.S.C. § 1677b(e)(2)(A) (1994).

uct in the "ordinary course of trade," Commerce excluded below-cost sales from the CV calculation that were considered to be outside of the "ordinary course of trade." *See id.* at 33,333–36.

B. Contentions of the Parties

SKF contends that Commerce's use of aggregate data that encompasses all foreign like products under consideration for NV for calculating CV profit is contrary to § 1677b(e)(2)(A) and to the explicit hierarchy established by § 1677(16) for selecting "foreign like product" for the CV profit calculation. *See* SKF's Reply Br. at 2–21. In addition, SKF argues, *inter alia*, that Commerce's CV profit methodology unlawfully excluded below-cost sales from the CV profit calculation. *See* SKF's Br. Supp. Mot. J. Agency R. at 3, 8–31.

Commerce responds that it properly calculated CV profit pursuant to § 1677b(e)(2)(A) based on aggregate profit data of all foreign like products under consideration for NV and it properly excluded below-cost sales from the CV profit calculation. *See* Def.'s Mem. in Opp'n to Pls.' Mot. J. Agency R. at 2, 4–19. Torrington agrees with Commerce's determinations. *See* Torrington's Resp. to Pls.' Mot. J. Agency R. at 2–3, 5–12.

C. Analysis

In *RHP Bearings Ltd. v. United States*, 23 CIT ____, 83 F. Supp. 2d 1322 (1999), this Court upheld Commerce's CV profit methodology of using aggregate data of all foreign like products under consideration for NV as being consistent with the antidumping statute. *See id.* at ____, 83 F. Supp. 2d at 1336. Since SKF's arguments and the CV profit methodology at issue in this case are practically identical to those presented in *RHP Bearings*, the Court adheres to its reasoning in *RHP Bearings* and, therefore, finds that Commerce's CV profit methodology and exclusion of below-cost sales to be supported by substantial evidence and in accordance with law.

II. *Other Issues*

The Court has considered SKF's other arguments to the *Final Results*, but finds them unpersuasive.

Conclusion

For the foregoing reasons, Commerce's final determination is affirmed in all respects. Case is dismissed.

(Slip Op. 00–60)

ROOSTER PRODUCTS, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 97–04–00586

[On proper classification of leather tool holders imported from Mexico, Plaintiff's Motion for Summary Judgment denied, Defendant's Cross-Motion for Summary Judgment granted.]

(Decided June 1, 2000.)

Jenkens & Gilchrist, P.C. (Robert L. Soza, Jr. and G. Erick Rosemond) for Plaintiff.
David W. Ogden, Acting Assistant Attorney General; *Joseph I. Liebman*, Attorney-in-Charge, International Trade Field Office; Commercial Litigation Branch, Civil Division, Department of Justice *(Mikki Graves Walser); George Brieger*, Office of Assistant Chief Counsel, International Trade Litigation, United States Customs Service, of counsel, for Defendant.

MEMORANDUM

I. INTRODUCTION

BARZILAY, *Judge:* The issue before the Court in this case is whether leather tool holders, the imported merchandise, falls within subheading 4202.91.00 of the Harmonized Tariff Schedule of the United States ("HTSUS").[1] The Court exercises jurisdiction pursuant to 28 U.S.C. § 1581(a) (1994). For the reasons that follow, the Court finds that classification under subheading 4202.91.00 HTSUS is correct.

II. BACKGROUND

The merchandise at issue is described by Plaintiff as an unbelted leather tool holder with a sleeve at the top where the user may insert her own belt. *See* Pl's Mot. Supp. Summ. J. at 2 ("Pl.'s Mot."). An examination of the pictures of the tool holder reveals that it has two large flared pockets, a couple of smaller pockets, and two loops. *See id.* at Exh. A, Attachment 1. The pockets are designed to hold smaller tools as well as nails, bolts, and similar small items. *See id.* at 3. The loops are designed for larger tools to hang from, such as a hammer or a pair of pliers. *See id.* When the tool holder is used in its intended manner it is worn like an apron around the individual's waist conforming to the contours of the individual's body. *See id.*

III. STANDARD OF REVIEW

The parties have cross moved for summary judgment, which is appropriate if "there is no genuine issue as to any material fact * * *." US-

[1] Subheading 4202 of the HTSUS provides for:

> Trunks, suitcases, vanity cases, attache cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; traveling bags, toiletry bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, jewelry boxes, powder cases, cutlery cases, and similar containers of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fiber or of paperboard, or wholly or mainly covered with such materials or with paper.

Subheading 4202.91.00 reads "Other: With outer surface of leather, of composition leather or of patent leather." Customs assessed the 1995 entries a 5.9% *ad valorem* rate, while assessing the 1996 entries a 6.2% *ad valorem* rate. The tariff provision otherwise is unchanged.

CIT R. 56(c). The parties agree on the physical characteristics of the imported merchandise, but dispute the classification. Based on a review of the undisputed facts, the Court agrees that this case is appropriately resolved through summary judgment.

Having decided no material facts are in dispute, the Court is then left with a purely legal question involving the meaning and scope of the tariff provision and whether it includes the imported merchandise. *See National Advanced Systems v. United States*, 26 F.3d 1107, 1109 (Fed. Cir. 1994). Although there is a statutory presumption of correctness for Customs decisions, 28 U.S.C. § 2639(a)(1) (1994), when the Court is presented with a question of law in a proper motion for summary judgment, that presumption does not apply. *See Universal Elecs., Inc. v. United States*, 112 F.3d 488, 492 (Fed. Cir. 1997); *Goodman Mfg., L.P. v. United States*, 69 F.3d 505, 508 (Fed. Cir. 1995) ("Because there was no factual dispute between the parties, the presumption of correctness is not relevant."). Accordingly, the Court proceeds to determine the correct classification of the merchandise.

IV. Discussion

Plaintiff argues that the proper classification of the tool holders is under subheading 4205.00.80 HTSUS, a basket provision providing for "Other articles of leather or of composition leather: * * * Other: * * * Other" with a free duty rate. Plaintiff contends that this basket provision is appropriate because it more accurately captures the tool holders since they are neither named nor like the exemplars listed in 4202.91.00 HTSUS. Defendant contends that the tool holder is a form of a tool bag, which is expressly provided for under 4202.91.00 HTSUS, and alternatively is *ejusdem generis* with the exemplars making classification therein appropriate.[2] Thus, unless the imported merchandise is neither provided for *eo nomine* nor can be considered a similar container by applying the principle of *ejusdem generis*, classification in subheading 4205.00.80 is inappropriate because 4202.91.00 more specifically provides for tool holders.

In a classification case the court begins its analysis by applying the General Rules of Interpretation ("GRI"). GRI 1 states that "classification shall be determined according to the terms of the headings and any relative section or chapter notes * * *." Plaintiff argues that because the tool holders are not specifically named, they do not fall within subheading 4202.91.00 HTSUS. An *eo nomine* provision without terms of limitation, however, includes all forms of the article in the absence of a contrary legislative intent. *See Lynteq, Inc. v. United States*, 976 F.2d 693, 697 (Fed. Cir. 1992) (citing *Hasbro Indus., Inc. v. United States*, 879 F.2d 838, 840 (Fed. Cir. 1989)). Furthermore, the common and commercial meaning of tariff terms are presumed to be the same. *See Rohm & Haas Co. v. United States*, 727 F.2d 1095, 1097 (Fed. Cir. 1984). While the

[2] According to some dictionary definitions the merchandise at issue might also fall within the definition of holster. *See* AMERICAN HERITAGE DICTIONARY 617 (2d college ed. 1991) Because the Court finds the tool holders to be covered as a form of a tool bag, a closer analysis is not necessary.

common meaning of a tariff provision is a question of law, the commercial meaning is one of fact. *See id.* The party seeking to establish that the commercial meaning was intended by Congress bears the burden of proving that the designation is definite, general and uniform throughout the trade. *See id.* Plaintiff has failed to meet its burden of proof to overcome the presumption that the commercial meaning of tool bag is different from its common meaning.[3]

To ascertain the common meaning of a tariff term, the "court may rely upon its own understanding of terms used, and may consult standard lexicographic and scientific authorities * * *." *Mita Copystar America v. United States*, 21 F.3d 1079, 1082 (Fed. Cir. 1994) (citing *Brookside Veneers, Ltd. v. United States*, 847 F.2d 786, 789 (Fed Cir. 1988)).

The definition of tool is not in dispute, rather the focus of the parties' arguments is over the definition of "bag". Plaintiff offers the following definitions:

> "[A] nonrigid container made of fabric, paper, leather, etc. with an opening at the top that can be closed." [WEBSTER'S NEW WORLD DICTIONARY (1968)]
>
> "[A] container that may be closed for holding, storing or carrying something." [WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (1984)]

Defendant offers the following definitions:

> "[A] sac or pouch, usually of woven material, leather, or paper, used as a receptacle." [FUNK & WAGNALL'S NEW STANDARD DICTIONARY OF THE ENGLISH LANGUAGE 210 (1956)]
>
> * * * * * * *
>
> "*[A] receptacle made of some flexible material closed in on all sides except at the top (where also it generally can be closed); a pouch, a small sack.*" [OXFORD ENGLISH DICTIONARY (2d Ed. on CD-ROM)]
>
> * * * * * * *
>
> "[A] usu. [sic] flexible container that may be closed for holding, storing or carrying something * * *." [WEBSTER'S NEW COLLEGIATE DICTIONARY 83 (1977)]

The Court has also found the following definitions:

> "A container in the form of a sack or pouch usually made from a flexible material such as paper or leather." [AMERICAN HERITAGE DICTIONARY 151 (2d College Ed. 1991).]
>
> "A container of flexible material, such as paper, plastic, or leather, that is used for carrying or storing items." ["Bag", *Dictionary.com* (visited May 4, 2000) <http://www.dictionary.com/cgi-bin/dict.pl?term=bag>]

It is clear to the Court based upon the definitions offered by the parties, its own research, and its understanding of the term, that a bag does

[3] At the hearing, Plaintiff argued that the Defendant had not submitted any competent evidence to contradict affidavit statements that the imported merchandise is not a tool bag. But, the well developed case law requires proof that Congress knew of and intended to use the word in its commercial meaning as well as that the proposed commercial meaning is definite, general, and uniform throughout the trade.

not have to close or be capable of closing. The defining characteristics of a bag are that it must be a container of flexible material with an opening at the top. While it is true that a bag often will be capable of closing, the Court is familiar with numerous types of bags that are not so designed. One such type of bag is seen frequently on the subways of New York City and is typically designed to carry books, newspapers, lunches and other items. It is has two handles and usually is made of some heavy type of cloth. Another bag of which the Court is aware that is not capable of being closed are the reusable textile or plastic shopping bags used by people who wish to avoid plastic or paper bags at the grocery store.

Examining Plaintiff's tool holder in light of the common meaning of tool bag as a flexible container with an opening at the top, it is apparent that the imported merchandise is a form of tool bag. Plaintiff admits that its tool holder is a flexible container. The belt area is comprised of several pouches with openings at the top into which various tools may be placed. Accordingly, the Court finds that the merchandise at issue is a form of tool bag composed of leather, and thus appropriately classified under subheading 4202.91.00 HTSUS.

In the alternative, even if the tool holders could not be considered a form of tool bag it would be necessary to examine whether they are similar to the exemplars expressly listed, thereby falling within subheading 4202.91.00 HTSUS. When a tariff provision lists a number of items and is followed by a general word or phrase, like the provision at issue's use of the phrase "similar containers," the rule of statutory construction called *ejusdem generis* applies. *See Avenues in Leather, Inc. v. United States*, 178 F.3d 1241, 1244 (Fed. Cir. 1999). Imported merchandise falls within the general phrase if it possesses the essential characteristics or purposes uniting the listed exemplars and does not have a more specific primary purpose that is inconsistent with the listed exemplars. *See id.* at 1244.

On two occasions the Federal Circuit has examined the provision at issue and held that the unifying characteristics of the listed exemplars are storage, protection, organization, and carriage. *See id.* at 1244 (citing *Totes, Inc. v. United States*, 69 F.3d 495, 498 (Fed. Cir. 1995)). Plaintiff argues that the intended use of the tool holders is neither to protect nor to store but to provide immediate and open access. The Court finds, however, that the tool holders perform all of the functions of the listed exemplars, and in no event have a specific purpose inconsistent with them.[4]

Plaintiff argues that the tool holder is designed in a manner that prevents the storage or protection of its contents. If, for example, the tool holder is taken off the user's belt and inverted, the contents could easily spill. Further, there is no method of protecting the contents such as a locking device. Clearly, Plaintiff is correct, but that does not negate the

[4] The Court's decision on this point renders it unnecessary to address whether all four characteristics must be present. *See, e.g., Jewelpak Corp. v. United States*, No. 94-04-00230, 2000 WL 382267, at *4 (CIT Apr. 13, 2000) (discussing whether a jewelry box must contain all four characteristics).

tool holders' ability to protect and store. Plaintiff's argument is based on too narrow a definition of these terms. As Defendant aptly noted, the tool holder protects and stores items while it is in use by preventing its contents from falling to the ground and by holding its contents while work is performed. Another problem with Plaintiff's argument is that it overemphasizes the protection and storage functions of the listed exemplars.

Examining a briefcase, to take one example with which the Court is familiar, exposes the weakness in Plaintiff's argument. A briefcase is designed to store, protect, organize, and carry its contents. A briefcase does not, however, perform these functions for an indefinite duration. Rather, the materials in the briefcase are usually returned to file cabinets, desk drawers and the like, for longer and safer storage. Like the tool holders, the briefcase allows the user to place the necessary materials for the day's work inside to be returned later to some other storage container. Just because the user of the tool holder removes the items she needs for the day from a tool bag or some other longer term storage device and later returns them does not place the tool holder outside the scope of the tariff provision at issue. Accordingly, even if the tool holders were not classifiable *eo nomine* as a form of a tool bag, they are still correctly classified through the application of *ejusdem generis* as similar containers.

V. Conclusion

For the reasons discussed above, the Court holds that classification of the subject merchandise is correct under subheading 4202.91.00 HTSUS. Judgment will enter accordingly.

(Slip Op. 00–61)

AMERICAN BAYRIDGE CORP., PLAINTIFF *v.*
UNITED STATES OF AMERICA, DEFENDANT

Court No. 98–08–02682

[Motion for Relief from Judgment denied.]

(Decided June 1, 2000)

Kirkland & Ellis (Kenneth G. Weigel) for Plaintiff.

David W. Ogden, Acting Assistant Attorney General, *Joseph I. Liebman*, Attorney-in-Charge International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Barbara S. Williams, Aimee Lee), Allan Martin*, Office of Associate Chief Counsel, United States Customs Service *(Louis Brenner Jr.)*, of counsel, for Defendant.

OPINION AND ORDER

I. Introduction

BARZILAY, *Judge:* The motion before the Court requests relief from the final order issued in *American Bayridge Corp. v. United States*, 86 F.

Supp.2d 1284 (CIT 2000), denying Plaintiff's application for attorney's fees under the Equal Access to Justice Act (28 U.S.C. § 2412 (1994)).[1] The Court found that the applicants, on whose behalf attorney's fees were sought, two trade association and Buchanan Lumber Sales, were not parties to the litigation, and therefore, denied the application. *See American Bayridge Corp.*, 86 F. Supp.2d at 1286–87. Now Plaintiff American Bayridge concedes that its name did not appear on the prior application form but argues that its mistake was excusable and that relief under USCIT R. 60(b)(1) is appropriate.[2] *See* Pl.'s Mem. P. & A. Supp. Relief at 1 ("Pl.'s Mot."). For the reasons that follow, the Court denies Plaintiff's request for relief from the final order.

II. Discussion

The provision of the rule at issue states, in relevant part, that "the court may relieve a party * * * from a final judgment, order, or proceeding for * * * mistake, inadvertence, surprise, or excusable neglect * * *." USCIT R. 60(b)(1). Plaintiff does not state which of the four factors favors relief, but it does state that it was the Court's decision that gave rise to the mistake, inadvertence, surprise, or excusable neglect. *See* Pl.'s Mot. at 5. Plaintiff argues that it believed "its interpretation of the word 'prevailing party' under EAJA was correct and thus omitted its name from the Court's form." *See id.* Plaintiff does not allege that any new information surfaced or that circumstances changed in the eighty-five day period from the issuance of the decision to the filing date of its current motion. The issue before the Court is whether Plaintiff is entitled to relief under USCIT R. 60(b) having failed to seek reconsideration under USCIT R. 59(e) or to file an appeal.

For reasons not disclosed by Plaintiff, it made no request to alter or amend the judgment under USCIT R. 59(e).[3] That provision provides for exactly the kind of relief and based upon the grounds Plaintiff alleges are present here. *See, e.g., Bio-Rad Labs., Inc. v. United States*, 12 CIT 597, 598, 687 F. Supp. 1580, 1580 (1988) (noting that USCIT R. 59 applies to rehearings directed to issues that were "treated, revealed or advanced in the original trial, decision or judgment").

A common characteristic of the grounds for granting relief under USCIT R. 60(b), however, is the availability of new information or some change in circumstances from the time the original judgment or order

---

[1] The original application was made following the Court's decision in *American Bayridge Corp. v. United States*, 22 CIT ____, 35 F.Supp.2d (1998). While the Federal Circuit vacated the Court's opinion as to the correct classification of the imported goods, the Court's decision on the proper interpretation of 19 U.S.C. § 1625 was not appealed, and thereby was unaffected by the decision. *See American Bayridge Corp. v. United States*, ____ F.3d ____, 1999 WL 997303 (Fed. Cir. 1999). Plaintiff argues that it is a prevailing party on the statutory interpretation issue and entitled to attorney's fees.

[2] Plaintiff argues in the alternative that relief under USCIT R. 60(b)(6) is also warranted. Because of the nature of the Court's decision, it also denies Plaintiff's motion pursuant to USCIT R. 60(b)(6). The Court grants Plaintiff's Motion for Leave to File a Reply over the Defendant's objections. Arguments in that reply brief were considered but did not prevail.

[3] While USCIT R. 59(e) is titled "Motion to Alter or Amend a Judgment," USCIT R. 54 defines judgment as "any order from which an appeal lies." Additionally, it is worth noting that USCIT R. 59(e) provides a more generous 30 day time period from which to move for reconsideration than its sister rule, Fed. R. Civ. P. 59(e), which provides only 10 days. USCIT R. 58 further provides that any decision from which an appeal lies, including a final order, must be on a separate document, signed by the court and entered by the clerk. All of these requirements were met, thus there can be no question that the order entered January 5, 2000 was a final order and, for purposes of USCIT R. 59(e), a judgment.

issued. *See Rhone Poulenc, Inc. v. United States*, 880 F.2d 401, 404 (Fed. Cir. 1989) (quoting *Bio-Rad Labs., Inc.*, 12 CIT at 598, 687 F. Supp. at 1580–81 (1988)). Therefore, Plaintiff's current motion fails to satisfy any of the factors set forth in USCIT R. 60(b)(1). Between the time the final order denying Plaintiff's application for attorney's fees issued and the time the thirty day time period for filing a USCIT R. 59(e) motion elapsed, nothing changed that would have prevented a timely USCIT R. 59(e) motion. Furthermore, filing a USCIT R. 59(e) motion tolls the time for filing an appeal, so had the Court denied the motion, Plaintiff would have had sixty days to appeal the original decision. *See Kraft, Inc. v. United States*, 85 F.3d 602, 604 (Fed. Cir. 1996) (citing FED. R. APP. P. 4(a)(4)).

Another option Plaintiff had available, but again for unstated reasons chose not to pursue, was a direct appeal to the Federal Circuit. As noted above, the order denying the application was final and appealable as of January 5, 2000. The time for filing an appeal, which in a case involving the United States is sixty days, is a jurisdictional prerequisite. *See Kraft, Inc.*, 85 F.3d at 604. As the Court has noted in the discussion above, Plaintiff's motion does not raise any new issue that was not present at the time the Court issued the final order. In the instant posture, the Court cannot see how Plaintiff's motion is anything other than a horizontal appeal, made in the hope of reinstating its right to appeal to the Federal Circuit. If the Court granted this motion it would undeniably set a troublesome precedent that any aggrieved party could file such a motion after the time had run under USCIT R. 59(e), as well as the time to appeal, by using the original decision itself as grounds for the motion. To hold such grounds legitimate would eviscerate USCIT R. 59(e) and FED. R. APP. P. 4.

III. CONCLUSION

For the foregoing reasons Plaintiff's USCIT R. 60(b) Motion for Relief from Judgment is denied.

(Slip Op. 00–62)

KOYO SEIKO CO., LTD. AND KOYO CORP. OF U.S.A., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND TIMKEN CO., DEFENDANT-INTERVENOR

Court No. 99–01–00001

Plaintiffs, Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A. (collectively "Koyo"), move pursuant to USCIT R. 56.2 for judgment upon the agency record challenging a single aspect of the Department of Commerce, International Trade Administration's ("Commerce") final determination, entitled *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan; Final Results of Antidumping Duty Administrative Reviews*, 63 Fed. Reg. 63,860 (Nov. 17, 1998).

Specifically, Koyo challenges Commerce's use of entered value to establish the assessment rate under 19 C.F.R. § 351.212(b) (1998).

Commerce and defendant-intervenor, The Timken Company, respond that Commerce's use of entered value to calculate the assessment rate under 19 C.F.R. § 351.212(b) was proper and in accordance with law.

Held: Koyo's motion is denied.

(Dated June 1, 2000)

Powell, Goldstein, Frazer & Murphy, LLP (Peter O. Suchman, Neil R. Ellis and *Elizabeth C. Hafner)* for plaintiffs.

David W. Ogden, Acting Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Michele D. Lynch);* of counsel: *John F. Koeppen*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, for defendant.

Stewart and Stewart (Terence P. Stewart, William A. Fennell and *Patrick J. McDonough)* for defendant-intervenor.

OPINION

TSOUCALAS, *Senior Judge:* Plaintiffs, Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A. (collectively "Koyo"), move pursuant to USCIT R. 56.2 for judgment upon the agency record challenging a single aspect of the Department of Commerce, International Trade Administration's ("Commerce") final determination, entitled *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan; Final Results of Antidumping Duty Administrative Reviews* ("*Final Results*"), 63 Fed. Reg. 63,860 (Nov. 17, 1998).

Specifically, Koyo challenges Commerce's use of entered value to establish the assessment rate under 19 C.F.R. § 351.212(b) (1998).

Commerce and defendant-intervenor, The Timken Company ("Timken"), respond that Commerce's use of entered value to calculate the assessment rate was proper and in accordance with law.

BACKGROUND

This case concerns an administrative review of the antidumping duty order on tapered roller bearings and parts thereof imported from Japan

during the review period of October 1, 1996 through September 30, 1997.[1]

Commerce reviewed and published the preliminary results on July 10, 1998. *See Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan; Preliminary Results of Antidumping Duty Administrative Reviews*, 63 Fed. Reg. 37,344. On November 17, 1998, Commerce published the final review at issue here. *See Final Results*.

The review arose from two antidumping proceedings: the antidumping finding regarding tapered roller bearings, four inches or less in diameter ("0–4" TRBs"), and components thereof, from Japan, *see Tapered Roller Bearings and Certain Components From Japan*, 41 Fed. Reg. 34,974 (Aug. 18, 1976), and the antidumping duty order on tapered roller bearings ("over–4" TRBs") and parts thereof, finished and unfinished, from Japan. *See Antidumping Duty Order; Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan*, 52 Fed. Reg. 37,352 (Oct. 6, 1987).

Although Commerce's notice of opportunity to request a review covered both antidumping proceedings, the antidumping finding concerning the 0–4" TRBs and the antidumping duty order concerning over–4" TRBs, Koyo only requested a review of the findings concerning 0–4" TRBs.

JURISDICTION

This Court has jurisdiction over this matter pursuant to 19 U.S.C. § 1516a(a) (1994) and 28 U.S.C. § 1581(c) (1994).

STANDARD OF REVIEW

This Court will uphold Commerce's final determination in an administrative review unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B).

I. *Substantial Evidence*

Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence "is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966); *see Timken Co. v. United States*, 12 CIT 955, 962, 699 F. Supp. 300, 306 (1988) ("It is not within the

[1] Since the administrative review at issue was initiated after December 31, 1994, the applicable law is the antidumping statute as amended by the Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994) (effective January 1, 1995) ("URAA"). *See Torrington Co. v. United States*, 68 F.3d 1347, 1352 (Fed. Cir. 1995) (citing URAA § 291(a)(2), (b) (noting effective date of URAA amendments)).

Court's domain either to weigh the adequate quality or quantity of the evidence for sufficiency or to reject a finding on grounds of a differing interpretation of the record.") (citation omitted). Moreover, "[t]he [C]ourt may not substitute its judgment for that of the [agency] when the choice is 'between two fairly conflicting views, even though the [C]ourt would justifiably have made a different choice had the matter been before it *de novo*. * * *'" *American Spring Wire Corp. v. United States*, 8 CIT 20, 22, 590 F. Supp. 1273, 1276 (1984) (quoting *Penntech Papers, Inc. v. NLRB*, 706 F.2d 18, 22–23 (1st Cir. 1983) (quoting, in turn, *Universal Camera*, 340 U.S. at 488)).

II. *Chevron Two-Step Analysis*

In determining whether Commerce's interpretation and application of the antidumping statute is "in accordance with law," the Court applies the two-step analysis prescribed by *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Under the first step, the Court reviews Commerce's construction of a statutory provision to ascertain whether "Congress has directly spoken to the precise question at issue." *Id.* at 842. To determine "whether Congress had an intention on the precise question at issue, [the Court] employ[s] the 'traditional tools of statutory construction.'" *Timex V.I., Inc. v. United States*, 157 F.3d 879, 882 (Fed. Cir. 1998) (citing *Chevron*, 467 U.S. at 843 n.9). "The first and foremost 'tool' to be used is the statute's text, giving it its plain meaning." *Id.* (explaining that "a statute's text is Congress's final expression of its intent") (citing *VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574, 1579 (Fed. Cir. 1990)). If the statute's plain language answers the question, "that is the end of the matter." *Id.* (citing *Muwwakkil v. Office of Personnel Management*, 18 F.3d 921, 924 (Fed. Cir. 1994)). Beyond the statute's text, the tools of statutory construction "include the statute's structure, canons of statutory construction, and legislative history." *Id.*; *but see Flora Trade Council v. United States*, 41 F. Supp. 2d 319, 323 n.6 (1999) (noting that "[n]ot all rules of statutory construction rise to the level of a canon, however.") (citing *U.S. Steel Group v. United States*, 22 CIT ____, 998 F. Supp. 1151, 1157–58 (1998) (rejecting the use of the *maxim expressio unius est exclusio alterius* to discern Congress's intent under *Chevron* step one)).

If, after employing the first prong of *Chevron*, the Court determines that the statute is silent or ambiguous with respect to the specific issue, the question for the Court becomes whether Commerce's construction of the statute is permissible. *See Chevron*, 467 U.S. at 843. Essentially, this is an inquiry into the reasonableness of Commerce's interpretation. *See Fujitsu Gen. Ltd. v. United States*, 88 F.3d 1034, 1038 (Fed. Cir. 1996); *see also Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984). Provided Commerce has acted rationally, the Court may not substitute its judgment for the agency's. *See IPSCO, Inc. v. United States*, 965 F.2d 1056, 1061 (Fed. Cir. 1992); *see also Koyo Seiko Co. v. United States*, 36 F.3d 1565, 1570 (Fed. Cir. 1994) (holding that "a court must defer to an agency's reasonable interpretation of a statute

even if the court might have preferred another."). The "[C]ourt will sustain the determination if it is reasonable and supported by the record as a whole, including whatever fairly detracts from the substantiality of the evidence." *Negev Phosphates, Ltd. v. United States*, 12 CIT 1074, 1077, 699 F. Supp. 938, 942 (1988). In determining whether Commerce's interpretation is reasonable, the Court considers the following non-exclusive list of factors: the express terms of the provisions at issue, the objectives of those provisions and the objectives of the antidumping scheme as a whole.

DISCUSSION

I. *Calculation of the Antidumping Duty Assessment Rate*

A. Background

This case arises from the final results of the antidumping duty order on tapered roller bearings and parts thereof manufactured by a foreign manufacturer, Koyo Seiko Co., Ltd., and imported from Japan by Koyo Corporation of U.S.A. ("KSU"), a subsidiary of Koyo, which through its sales and distribution division, Koyo Corporation of U.S.A.-Sales Division, was an exclusive importer of merchandise produced by Koyo Seiko Co., Ltd., during the review period of October 1, 1996 through September 30, 1997. *See Final Results*, 63 Fed. Reg. at 63,860. In the subject review, Commerce, following its usual practice in ascertaining cash deposit rates and assessment rates, stated that "[t]he cash deposit rate has been determined on the basis of the selling price to the first unaffiliated U.S. customer. For appraisement purposes, where information is available, [Commerce] will use the entered value of the merchandise to determine the assessment rate." *Final Results*, 63 Fed. Reg. at 63,876.

Any of Commerce's findings concerning assessment rates and cash deposit rates is subject to 19 U.S.C. § 1675(a)(1)(B) (1994) which provides that Commerce shall "review, and determine (in accordance with paragraph(2)), the amount of any antidumping duty * * *." Paragraph two further states that the dumping margin "shall be the basis for the assessment of * * * antidumping duties on entries of merchandise * * *." 19 U.S.C. § 1675(a)(2)(C).

The dumping margin (equal to the amount of antidumping duty owed) is the amount by which normal value ("NV") exceeds the export price ("EP") or constructed export price ("CEP") on the subject merchandise sold during the period of review ("POR").[2] *See* 19 U.S.C. § 1677(35) (1994).

NV is the comparable price for a product like the imported merchandise when first sold (generally, to unaffiliated parties) "for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade and, to the extent practicable, at the same level

---

[2] Because Koyo had only constructed export price ("CEP") sales during the period of review ("POR"), Koyo's arguments address only the calculation of the assessment rate for CEP sales. *See* Koyo's Reply Br. at 2 n.1. However, for the purpose of our analysis, the outcome would be identical if Koyo had both export price ("EP") and CEP or only EP sales during the POR.

of trade as the export price or constructed export price." 19 U.S.C. § 1677b(a)(1)(B)(i) (1994).

The export price means the "price at which the subject merchandise is first sold * * * by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser," while the constructed export price is the "price at which the subject merchandise is first sold * * * in the United States * * * [by] producer or exporter * * * to a purchaser not affiliated with the producer or exporter * * *." 19 U.S.C. § 1677a(a),(b) (1994).

Cash deposit is a provisional remedy. When Commerce directs Customs to suspend liquidation upon a preliminary determination of dumping, the importer must make a cash deposit of estimated antidumping duties with Customs or post a bond or other security. *See* 19 U.S.C. § 1675(a)(2)(B)(iii); *accord* General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A–3, 55 U.N.T.S. 187 ("GATT 1947"). Commerce orders the posting of a cash deposit in an amount equal to the estimated average amount by which the foreign market value exceeds the United States price, that is, the dumping margin. 19 U.S.C. § 1673b(d)(1)(B) (1994); *see also* 19 U.S.C. § 1673e(b) (1994) (applying similar calculation for Commerce's final determination). Commerce then calculates the cash deposit rate by dividing "'the aggregate dumping margins by the aggregated United States prices.'" *See, e.g., National Steel Corp. v. United States*, 20 CIT 743, 746, 929 F. Supp. 1577, 1581 (1996) (citing 19 C.F.R. § 353.2(f)(2) (1993)); *accord* 19 U.S.C. § 1677(35)(B) (stating that "'weighted average dumping margin' is the percentage determined by dividing the aggregate dumping margins * * * by the aggregate export prices * * *."). Commerce interprets the term "United States price" as the sale price after Commerce has made all adjustments as provided for by law. *See National Steel*, 20 CIT at 746, 929 F. Supp. at 1581 (citing 19 C.F.R. § 353.41(d)(iii) (1993)).

When an antidumping duty is imposed upon imported merchandise, Commerce calculates an assessment rate for each importer by dividing the dumping margin for the subject merchandise by the entered value of such merchandise for normal Customs purposes. *See* 19 C.F.R. § 351.212(b).

In promulgating 19 C.F.R. § 351.212(b), Commerce reasoned as follows:

> [Section] 351.212(b)(1) [deals] with the method that [Commerce] will use to assess antidumping duties upon completion of a review. * * * [Commerce] provided that it normally will calculate an "assessment rate" for each importer by dividing the absolute dumping margin found * * * by the entered value * * *. [The rule] merely codified an assessment method that [Commerce] has come to use more and more frequently in recent years.
>
> Historically, [Commerce] (and, before it, the Department of Treasury) used the so-called "master list" (entry-by-entry) assessment method. Under the master list method, [Commerce] would list the appropriate amount of duties to assess for each entry of subject

> merchandise separately in its instructions to the Customs Services. However, in recent years, the master list method has fallen into disuse for two principal reasons. First, in most cases, respondents have not been able to link specific entries to specific sales, particularly in CEP situations in which there is a delay between the importation of merchandise and its resale to an unaffiliated customers. Absent an ability to link entries to sales, [Commerce] cannot apply the master list method. Second, even when respondents are able to link entries to sales, there are practical difficulties in creating and using a master list if the number of entries covered by a review is large. Preparing a master list that covers hundreds or thousands of entries is a time-consuming process, and one that is prone to errors by [Commerce] and/or Customs Service staff. * * *

Antidumping Duties; Countervailing Duties, 62 Fed. Reg. 27,296, 27,314 (May 19, 1997).

B. Contentions of the Parties

1. Commerce's Contentions

Commerce contends that the calculation of the assessment rate pursuant to 19 C.F.R. § 351.212(b) by dividing the dumping margin by the entered value of the subject merchandise was reasonable and in accordance with law. *See* Def.'s Mem. In Opp'n to Pls.' Mot. J. Agency R. ("Def.'s Mem.) at 4–7.

According to Commerce, the requirement of 19 U.S.C. § 1675(a)(2) that the amount by which NV exceeds CEP (or EP)"be the basis for the assessment of * * * antidumping duties" is fully satisfied by the methodology devised in 19 C.F.R. § 351.212(b) because the first step of the calculation, the computation of the dumping margin (the numerator) as the difference between NV and Koyo's CEP, supplies the statutorily-prescribed basis for the entire formula set forth in 19 C.F.R. § 351.212(b). *Id*. at 5–6 (citing *Koyo Seiko Co. v. United States*, 16 CIT 539, 796 F. Supp. 1526 (1992)). Commerce further asserts that "[t]he purpose of using entered value in the denominator [in the formula for an assessment rate] is to allocate the dumping margin among the importers of the merchandise." *Id*. at 4.

2. Koyo's Contentions

In response, Koyo asserts that Commerce unlawfully calculated the antidumping duty assessment rate under 19 C.F.R. § 351.212(b) because Commerce used the entered value for the subject merchandise as the denominator in the formula. *See* Pls.' Mem. Supp. Mot. J. Agency R. (Pls.' Mem.) at 6–8; Koyo's Reply Br. at 2–6. Koyo alleges that because 19 U.S.C. § 1675(a)(2)(A),(C) requires that the dumping margin be calculated as the difference between NV and CEP, and since NV and CEP are both price-based concepts, the logic of the statute necessitates that the denominator used in the formula must also be a price-based concept, specifically, sales value. *See* Koyo's Reply Br. at 2, 4. Koyo, therefore, concludes that Commerce's use of entered value instead of sales value as

the denominator is either unreasonable or in violation of the statutory language of 19 U.S.C. §§ 1675(a)(1)(B) and 1675(a)(2). *Id.*

Furthermore, Koyo maintains that because Commerce always uses sales value as the denominator for calculating cash deposit rates, Commerce must apply the same calculation method to the assessment rates. *See* Pls.' Mem. at 4. Koyo argues that Commerce's use of different denominators for cash deposit rates and assessment rates creates a distinction between the two that conflicts with the mandate of 19 U.S.C. § 1675(a)(2). *See* Koyo's Reply Br. at 4.

Finally, Koyo notes that Commerce's use of 19 C.F.R. § 351.212(b) is unreasonable as applied because all of Koyo's merchandise for the POR was imported solely by KSU and, therefore, Commerce's purpose of using entered value as the denominator in order to "'allocate the dumping margin among importers of the merchandise produced'" has no relevance to Koyo's situation. *Id.* at 3.

Although Koyo concedes that this Court upheld Commerce's methodology for calculating the assessment rates in *Koyo Seiko Co. v. United States*, 16 CIT 539, 796 F. Supp. 1526 (1992), *vacated in part on other grounds*, 806 F. Supp. 1008 (1992) ("*Koyo 1992*"), Koyo asserts that the issue was not finally resolved by a determination by the Court of Appeals for the Federal Circuit ("CAFC"). *See id.* at 5–6; Pls.' Mem. at 5.

3. Timken's Contentions

Contrary to Koyo and in support of Commerce, Timken contends that the language of 19 U.S.C. §§ 1675(a)(1)(B) and (a)(2) permits Commerce's methodology for calculating assessment rates because the mere fact that the numerator is calculated as the difference between NV and CEP satisfies the statutory requirement to use the differential as the basis for the entire formula. *See* Timken's Resp. to Pls.' Mem. Supp. J. Agency R. ("Timken's Resp.") at 4–5. Timken also points out that, contrary to Koyo's claim, there is binding precedent by the CAFC upholding Commerce's methodology for purposes of calculating cash deposit rates and assessment rates. *Id.* at 6–7 (citing *Torrington Co. v. United States*, 44 F.3d 1572 (Fed. Cir. 1995)).

C. Analysis

The issue presented by Koyo is whether 19 U.S.C. §§ 1675(a)(1)(B) and (a)(2) require Commerce to calculate assessment rates using sales value, rather than entered value.

The Court's analysis begins with an examination of the relevant statutory provisions. Section 1675(a)(1)(B) provides that Commerce shall "review, and determine (in accordance with paragraph (2)), the amount of any antidumping duty * * *." Paragraph two states that the amount by which normal value exceeds export price (or constructed export price) "shall be the basis for the assessment of * * * antidumping duties on entries of merchandise * * *." 19 U.S.C. §§ 1675(a)(1)(B),(a)(2).

Koyo contends that this language indicates Congress has directly spoken to the precise question at issue, dictating that the sales value should be used as the denominator for the purposes of calculating assessment

rates. *See* Koyo's Reply Br. at 4. However, the plain language of the statute does not positively speak to the question at issue. It merely provides that the difference between NV and CEP (or EP) "shall be the basis" for the assessment of duties. 19 U.S.C. § 1675(a)(2). In fact, there is nothing in 19 U.S.C. §§ 1675(a)(1)(B) or (a)(2) which states that Commerce is prohibited from using any concepts other than NV and EP (or CEP) to devise the formula for assessment rates. If Congress wanted to create a precise formula or exclude all other concepts from any part of the calculation, it would have said so in clear and unequivocal terms. *See United States v. Int'l Bus. Machs. Corp.*, 892 F.2d 1006, 1009 (Fed. Cir. 1989). Congress' choice to designate just the first step in the calculation indicates that Congress purposely left the task of devising the formula to Commerce's expertise.

Because the language of the statute is not dispositive, we turn to the legislative history of 19 U.S.C. §§ 1675(a)(1)(B) and (a)(2) to determine whether Congress has "directly addressed the precise question at issue." *Chevron*, 467 U.S. at 843; *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 966 F.2d 660, 667 (Fed. Cir. 1992). The language of 19 U.S.C. § 1675(a)(2) derives from 19 U.S.C. § 1673(2)(B) (1994), which states that "there shall be imposed upon * * * merchandise an antidumping duty * * * in an amount equal to the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise." Section 1673(2)(B) is, in turn, a result of Congressional amendment to the antidumping laws by reason of the URAA. *See Sharp Corp. v. United States*, 63 F.3d 1092, 1093 (Fed. Cir. 1995). Although many of the statutory terms have been renamed under the the URAA (e.g., "export price" replaced "purchase price," "constructed export price" replaced "exporters sales price," and "normal value" replaced "foreign market value"), the substance of these terms remained the same as it was before the amendments. *See Sharp*, 63 F.3d at 1093 n.1. The URAA amendments, in turn, adopted the standard definition of dumping employed by Article VI of GATT 1947. *See, e.g.*, RAJ BHALA, INTERNATIONAL TRADE LAW, CASES AND MATERIALS 649 (1996). Thus, the Congressional choice of language found in 19 U.S.C. §§ 1675(a)(1)(B) and 1675(a)(2) is a result of the evolution of antidumping law. There is nothing in the history of GATT 1947, the URAA, or 19 U.S.C. §§ 1675(a)(1)(B) and (a)(2) that indicates any intent to designate a specific denominator for the assessment rate formula. Therefore, the Court concludes that neither the statute nor its legislative history provides an "unambiguously expressed intent" with regard to the precise question at issue. *Chevron*, 467 U.S. at 843.

In situations where Congress has not provided clear guidance on an issue, the *Chevron* test requires us to defer to the agency's interpretation of its own statute as long as that interpretation is reasonable. *See Chevron*, 467 U.S. at 845; *Koyo Seiko*, 36 F.3d at 1570; *IPSCO*, 965 F.2d at 1061. Therefore, we are to examine whether Commerce's promulgation of 19 C.F.R. § 351.212(b) was reasonable under the statutory mandate.

Section 1675(a)(2) provides that the dumping margin "shall be the basis for the assessment * * * of antidumping duties on entries of the merchandise * * *." 19 U.S.C. § 1675(a)(2)(C). Koyo argues that Commerce's inclusion of the entered value in the assessment rate formula is unreasonable in view of this language. *See* Koyo's Reply Br. at 2, 4. This Court disagrees. Congress' use of the term "basis" does not manifest its intent to tie the minuend and subtrahend of the dumping margin calculation to the denominator used in the assessment rate formula.

The dictionary definition of "basis" is "the principal component." BLACK'S LAW DICTIONARY 151 (6th Ed. 1990). Congress' use of the term "basis" implies neither exclusivity of components nor similarity among them. The statutory language simply means that the dumping margin should be a principal component of the calculation and Commerce fully satisfied this requirement. As this Court has already stated, "Commerce did in fact calculate the dumping margins as the difference between foreign market value and the U.S. price, which was therefore the basis for the assessment of dumping duties" in accord with the requirements of 19 U.S.C. § 1675(a)(2). *Koyo 1992*, 16 CIT at 541, 796 F. Supp. at 1529. Commerce's use of a figure different from NV or EP (or CEP) as the denominator in the assessment rate formula is not unreasonable under the statutory mandate.

Koyo maintains that Commerce's use of the entered value was an unreasonable choice "[b]ecause [when] the basic building blocks for the margin calculation [, that is, NV and CEP,] * * * are all based on price, * * * the only lawful ratio by which to establish the assessment rates is one in which the denominator is also based on sales value * * *." Pls.' Mem. at 8. In essence, Koyo alleges that among other choices, Commerce's use of the "entered value" concept as the denominator was in violation of the logic of the statute because entered value is entirely divorced from sale. Koyo's Reply Br. at 2, 6. This claim is unwarranted. Traditionally, the entered value of merchandise for normal Customs purposes is equal to the invoice value of the subject merchandise less freight, insurance premium costs and other applicable non-dutiable charges. *See Mitsubishi Int'l Corp. v. United States*, 78 Cust. Ct. 4, C.D. 4686 (1977); *Pistorino & Co. v. United States*, 65 Cust. Ct. 387, C.D. 4110 (1970); *S. Vollman & Sons v. United States*, 10 Cust. Ct. 532 (1943); *Mitsui & Co. v. United States*, 7 Cust. Ct. 598 (1941); *United States v. Von Hamm Young Co.*, 1 Cust. Ct. 597 (1938). The invoice value, in turn, is defined as the purchase price of the subject merchandise or, "in the case of merchandise not purchased or consigned for sale, a statement of the fair retail value in the country of shipment." 19 C.F.R. § 145.11(b) (1998). Therefore, the entered value of the subject merchandise is an adjusted purchase price of the merchandise, clearly a sales-related concept. If Koyo's desire is to have a sales-related concept for the denominator, the Court points out that Commerce's current methodology already satisfies Koyo's wish.

Alternatively, Koyo alleges that Commerce's methodology is unreasonable as applied in view of the fact that (a) Koyo Seiko Co., Ltd. has only one importer of its merchandise, KSU, its subsidiary, and (b) Commerce's argument for using entered value as the denominator is to "allocate the dumping margin among [different] importers." Koyo's Reply Br. at 3. Koyo asserts that the assessment rate formula is inapplicable to Koyo's particular situation. *Id.* The statement suffers from multiple flaws.

First, Koyo fails to observe that in addition to its desire to allocate the dumping margin among importers, Commerce had other valid motives for adopting entered value as the denominator, for example, administrative ease, accuracy, promptness and efficiency. *See Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. at 27,314–315.

Second, this Court is not aware of any prohibition against allocating the dumping margin among the merchandise of one importer.

Third, it would be unreasonable, if not anomalous, for Commerce to devise an assessment rate formula for importers enjoying exclusivity with manufacturers different from the formula applied to all other importers. This approach would allow manufacturers and importers to manipulate assessment rates by changing the number of importers. It would also unfairly disadvantage those importers who, because of contractual obligations, unfavorable fluctuations of market, or because they are at the initial stages of business development and are faced with financial constraints, are unable to engage in exclusive import arrangements. Commerce is not expected to cater to Koyo's private circumstances based on Koyo's preferences in doing business, its corporate structure or business needs.

Finally, Koyo argues that the methodology for calculating assessment rate is unreasonable because it differs from that used for calculating cash deposit rates. *See* Pls.' Mem. at 6–8; Koyo's Reply Br. at 4. Koyo claims the distinction is not authorized by 19 U.S.C. § 1675 (a)(2)(C). *See* Koyo's Reply Br. at 4. Koyo is incorrect. As Timken correctly points out, the issue was already resolved by *Torrington Co. v. United States*, 44 F.3d 1572 (Fed. Cir. 1995) where the CAFC held that:

> Section 1675(a)(2) does not require the same method of calculation for assessment rates and cash deposit rates. Nor does it specify a particular [denominator] when calculating either assessment rates or cash deposit rates. Rather, the statute merely requires that [the dumping margin], the difference between foreign market value and United States price, serve as the basis for both assessed duties and cash deposits of estimated duties. * * * [The] use of different methods for calculating these rates does not conflict with the statute.

Id. at 1578.

Furthermore, § 1675(a)(1)(B) and (a)(2) do not state that the assessment rates for each entry of subject merchandise must be identical to cash deposit rates. Had Congress wanted both figures to be the same, it would have stated so in definite terms rather than merely provide a ba-

sis for these two different calculations. Commerce's practice reflects the fact that cash deposits are nothing but estimates of future dumping liabilities and, because the Tariff Act merely requires that both the deposit rate and the assessment rate be derived from the same dumping margin differential, there could be no certainty that the cash deposit rate would be equal to the actual assessment. *See generally Certain Hot-Rolled Lead and Bismuth Carbon Steel Products From the United Kingdom; Final Results of Countervailing Duty Administrative Review*, 60 Fed. Reg. 54,841 (Oct. 26, 1995); *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France; et al.; Final Results of Antidumping Duty Administrative Reviews*, 57 Fed. Reg. 28,360 (June 24, 1992). A cash deposit rate may differ from the assessment rate and, if actual duty levels exceed the cash deposits, Commerce instructs the Customs Service to collect the difference. *See, e.g., Final Results of Antidumping Duty Administrative Reviews and Revocation in Part of an Antidumping Duty Order*, 58 Fed. Reg. 39,729 (July 26, 1993).

CONCLUSION

In light of the above and the considerable discretion that Congress afforded Commerce in §§ 1675(a)(1)(B) and (a)(2), the Court finds Commerce's methodology reasonable and sustains its methodology for calculating the assessment rate. *See ICC Indus., Inc. v. United States*, 812 F.2d 694, 699 (Fed. Cir. 1987); *Consumer Prods. Div., SCM Corp. v. Silver Reed America, Inc.*, 753 F.2d 1033, 1039 (Fed. Cir. 1985).

Index

Customs Bulletin and Decisions
Vol. 34, No. 27, July 5, 2000

U.S. Customs Service

Treasury Decisions

General Notices

CUSTOMS RULINGS LETTERS AND TREATMENT

U.S. Court of International Trade

Slip Opinions

Federal Recycling Program
Printed on Recycled Paper
U.S. G.P.O. 2000–432–394–80093